TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1921

No. [redacted]91

C. E. SCHAFF, AS RECEIVER OF THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

J. C. FAMECHON COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

FILED JUNE 21, 1920.

(27,770)

(27,770)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 413.

C. E. SCHAFF, AS RECEIVER OF THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

J. C. FAMECHON COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 14, 1920.

a STATE OF MINNESOTA,
County of Hennepin:

In Municipal Court, City of Minneapolis.

C. E. SCHAFF, as Receiver of the Missouri, Kansas & Texas Railway Company, a Corporation, Plaintiff,

vs.

J. C. FAMECHON COMPANY, a Corporation, Defendant.

Summons.

The State of Minnesota to the above-named defendant:

You are hereby summoned and required to answer the complaint of the plaintiff in the above entitled action, which complaint is hereto annexed and herewith served upon you, and to serve a copy of your answer to the said complaint on the subscribers at their office at 1018 Northern Pacific Railway Building, St. Paul, Minnesota, in the said County of Ramsey within ten days after service of this summons upon you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiff in this action will apply to the Court for the relief demanded in said complaint.

Dated October 25, 1918.

D. R. FROST,
Attorney for Plaintiff.

1018 Nor. Pac. Ry. Bldg.,
St. Paul, Minnesota.

1 STATE OF MINNESOTA,
County of Hennepin:

Municipal Court, City of Minneapolis.

C. E. SCHAFF, as Receiver of the Missouri, Kansas & Texas Railway Company, a Corporation, Plaintiff,

vs.

J. C. FAMECHON COMPANY, a Corporation, Defendant.

Complaint.

Now comes the plaintiff as receiver of the Missouri, Kansas and Texas Railway Company, a corporation, and for a first cause of action against the defendant, alleges:

I.

That the defendant is a corporation according to law.

II.

That at the times hereinafter referred to the Missouri, Kansas and Texas Railway Company was and still is a corporation owning and engaged in operating a railway line between different states, and as such is subject to the laws of Congress regulating interstate commerce.

2

III.

That on the 27th day of September, 1915, in an action then pending in the District Court of the United States for the Eastern Division of the Eastern District of Missouri, said District Court having jurisdiction of the parties and of the subject matter of said action, by an order duly made and filed appointed the plaintiff receiver of said Missouri, Kansas and Texas Railway Company, and of all its property, choses in action, assets and effects. That on the same day plaintiff duly qualified and entered upon the discharge of his duties as such receiver and took possession of all the property, choses in action, assets and effects of said Missouri, Kansas & Texas Railway Company, and since said 27th day of September, he has been and still is the duly qualified and acting receiver of said Railway Company, and is in actual possession and control of all its property, choses in action, assets and effects.

IV.

That said District Court by its order duly made and filed, directed and authorized the plaintiff to collect all assets due the said railway company by suit or otherwise, and that plaintiff by said District Court's order is duly authorized to bring this action.

V.

That prior to the times herein mentioned the Missouri, Kansas and Texas Railway Company, and the connecting carriers that participated in the movement of the shipments hereinafter mentioned had duly filed with the Interstate Commerce Commission

3 tariffs and schedules showing the rates and charges for the transportation of potatoes from the points of origin to the points of destination hereinafter mentioned, which tariffs and schedules had been duly published, as required by law, and were in effect. By said tariffs and schedules, among other things, it was provided: "When the shipper orders a refrigerator or other insulated car to be heated by him or to move without heat, a charge of $5 per car per trip will be made, for the use of said car, and will accrue to the owner thereof."

VI.

That in the year 1915, at the defendant's request the Missouri, Kansas and Texas Railway Company received refrigerator cars loaded with potatoes (which refrigerator cars had been ordered for loading by the several shippers thereof) for transportation and delivery to the stations hereinafter mentioned on the line of said Missouri, Kansas, and Texas Railway, in accordance with the duly filed and published tariffs and schedules as aforesaid. Said cars were duly transported and delivered in accordance with said tariffs and schedules. That a detailed statement of said refrigerator cars, showing the car number, initial, date of origin of shipment, point of origin, point of destination, is as follows:

No.	Initial.	Date.	Point of origin.	Point of destination.
98837	N. P.....	Jan. 21, '15.	Rush City, Minn.	Oklahoma City, Okla.
50310	G. N.....	Feb. 25, '15.	Grasston, Minn.	Muskogee, Okla.
37393	C. B. & Q.....	Mar. 1, '15.	Isanti, Minn.	McAllister, Okla.

4

31644	G. N.....	Mar. 12, '15.	Bock, Minn.	Sulphur Springs, Tex.

Under the Act of Congress entitled "An Act to Regulate Commerce" approved February 4, 1887, and amendments thereto, it was the duty of the Missouri, Kansas and Texas Railway Company as the delivering carrier to collect the rates and charges which were set forth in the tariffs and schedules above referred to, and as a part of said charges to collect as car rental $5 for the use of each of the cars above mentioned. Said Missouri, Kansas and Texas Railway Company did collect and the defendant did so pay the rates and charges. Thereafter defendant made claims against said M. K. & T. Ry. Co., for an overcharge of five dollars ($5), in respect to each of the above named shipments, alleging and asserting that under the law and the tariffs and schedules above mentioned said Missouri, Kansas and Texas Railway Company ought not to have assessed and collected a five dollar rental charge for the use of each of the refrigerator cars in which the above shipments moved. That an agent of said Missouri, Kansas and Texas Railway Company by mistake and a misunderstanding of the tariffs and schedules authorized defendant to draw on said Missouri, Kansas and Texas Railway Company for twenty dollars ($20.00), and said railway company refunded to defendant the sum of twenty dollars ($20.00). That the amount of the alleged overcharges on the above shipments so refunded to defendant was twenty dollars ($20.00). That although plain-
5 tiff has duly demanded payment of said twenty dollars ($20.00) from defendant, payment thereof has been refused.

For a second cause of action herein, plaintiff alleges and realleges all of the allegations and statements contained in paragraphs numbered I, II, III, IV, V and VI, of the first cause of action herein.

Alleges that on October 26, 1914, at Rush City, Minnesota, on the line of the Northern Pacific Railway Company, the defendant delivered to said railway company a shipment of potatoes loaded in

refrigerator car N. P. 96574, billed and consigned for transportation over the line of said railway company and connecting carriers, including the Missouri, Kansas and Texas Railway Company, to Muskogee, Oklahoma, upon the understanding and agreement that said Northern Pacific Railway Company and its connecting carriers should transport said shipment to Muskogee, there deliver the same, and that defendant would pay the legal transportation charges, according to the tariffs and schedules above referred to.

Said shipment was duly transported and said Missouri, Kansas and Texas Railway Company received said shipment and duly transported the same and delivered it at Muskogee, Oklahoma. The shipper of said potatoes ordered a refrigerator car for use in the transportation of said shipment. By mistake the agent of said Missouri, Kansas and Texas Railway Company, failed to collect as a part of the transportation charges five dollars (85) for rental of the refrigerator car, and, although payment of said five dollars has been duly demanded from the defendant, payment thereof, is refused.

6 Wherefore plaintiff demands judgment against the defendant for twenty-five dollars ($25.00) with interest, according to law, and for the costs and disbursements herein.

D. R. FROST,
Attorney for Plaintiff.

1018 Nor. Pac. Ry. Bldg.,
St. Paul, Minn.

STATE OF MINNESOTA,
County of Ramsey, ss:

D. R. Frost being first duly sworn, says that he is the attorney for the plaintiff in the above entitled action; that he has read the foregoing complaint and knows the contents thereof, that the same is true to the best of his knowledge, information and belief; that the reason why this verification is not made by the plaintiff is that said plaintiff is absent from the County of Ramsey wherein affiant resides.

D. R. FROST.

Subscribed and sworn to before me this 25th day of October, A. D. 1918.

[Notarial Seal.] EDWIN IRLE,
Notary Public, Hennepin County, Minn.

My Commission Expires Nov. 29, 1922.

Endorsed: Filed Nov. 8, 1918. Harry Moore, clerk, by C. A. Eck, deputy.

STATE OF MINNESOTA,
County of Hennepin:

Municipal Court, City of Minneapolis.

C. E. SCHAFF, as Receiver of the Missouri, Kansas & Texas Railway Company, a Corporation, Plaintiff,

vs.

J. C. FAMECHON COMPANY, a Corporation, Defendant.

Answer.

Defendant for its answer to the complaint of the plaintiff herein alleges:

I.

Denies each and every allegation in said complaint contained in said first cause of action except as hereinafter specifically admitted or qualified.

Admits paragraphs I, II, III and IV of the first cause of action.

II.

Denies each and every allegation in the second cause of action in said complaint contained except paragraphs I, II, III, and IV.

Further answering and as a counterclaim defendant alleges:

III.

Defendant realleging the allegations contained in paragraphs I, II, III and IV of plaintiff's first and second cause of action and making them a part hereof.

Further alleges that during the year 1916, there were de-
7 livered to plaintiff on behalf of defendant by a carrier connecting with plaintiff two carloads of potatoes for transportation by plaintiff from the place of such delivery to points within the state of Oklahoma, hereinafter designated on the line of plaintiff's railroad.

That plaintiff received said two carloads of potatoes from said connecting carrier, and undertook and agreed with defendant to transport the same and, at the points hereinafter designated, to deliver the same to defendant, or to such party as defendant should designate, at the lawful rate for such transportation. That a statement of such cars, showing the car number and its initial, date of shipment, point of origin and destignation is as follows:

No.	Date.	Initial.	Origin.	Destination.
37705.	Feb. 22, '16.	C. B. & Q.	Grasston, Minn.	Coalgate, Okla.
53092.	Feb. 24, '16.	G. N.	Isanti, Minn.	Durant, Okla.

IV.

That pursuant to said undertaking plaintiff did transport said two carloads of potatoes as aforesaid, but in violation thereof, refused to deliver the same to defendant, or party designated by defendant, without the payment on each car of the sum of five dollars ($5) in excess of the lawful rate for such transportation, carriage and delivery. That by reason of such refusal and in order to insure delivery of said potatoes defendant was compelled to, and did, pay plaintiff said overcharge of five dollars ($5) on each of said cars.

That though demanded said plaintiff has failed and refused,
8 and still fails and refuses, to adjust, tender or pay to defendant said overcharge.

V.

That by reason of the premises there is due and owing defendant by plaintiff the sum of ten dollars ($10) with interest.

Wherefore defendant demands judgment that plaintiff take nothing by said action but that defendant have judgment against plaintiff for the sum of ten dollars ($10), with interest thereon at 6% from the 24th day of February, 1916, together with the costs and disbursements of this action.

G. H. SMITH,
Attorney for Defendant.

711 N. Y. Life Bldg.,
Minneapolis, Minn.

STATE OF MINNESOTA,
County of Hennepin, ss:

M. C. Ragatz being first duly sworn on oath says that he is the secretary of the Famechon Company the defendant above named and makes this affidavit on their behalf. That he has read the above and foregoing answer and that the same is true of his own knowledge except as to those matters therein alleged on information and belief and as to those matters he believes it to be true.

M. C. RAGATZ.

Subscribed and sworn to before me this 6th day of November, 1918.

[Notarial Seal.] R. E. SEAVEY,
Notary Public, Hennepin Co., Minn.

My commission expires July 10, 1925.

Endorsed: Filed Nov. 8, 1918. Harry Moore, clerk, by C. A. Eck, deputy.

STATE OF MINNESOTA,
County of Hennepin:

Municipal Court, City of Minneapolis.

C. E. SCHAFF, as Receiver of the Missouri, Kansas and Texas Railway Company, a Corporation, Plaintiff,

vs.

J. C. FAMECHON COMPANY, a Corporation, Defendant.

Reply.

The plaintiff for his reply to the counterclaim set forth in the answer herein denies each and every allegation and matter contained in said counterclaim, save and except as the averments of the complaint are admitted.

Wherefore, the plaintiff asks judgment as prayed for in the complaint.

D. R. FROST,
Attorney for Plaintiff.

1018 Northern Pacific Ry. Bldg.,
St. Paul, Minn.

STATE OF MINNESOTA,
County of Ramsey, ss:

D. R. Frost being first duly sworn, says that he is the attorney for the plaintiff in the above entitled action; that he has read the foregoing reply and knows the contents thereof, that the same is true to the best of his knowledge, information and belief; that the reason why this verification is not made by the plaintiff is that said plaintiff is absent from the County of Ramsey, wherein affiant resides.

D. R. FROST.

Subscribed and sworn to before me this 7th day of November A. D. 1918.

[Notarial Seal.] EDWIN IRLE,
Notary Public, Hennepin County, Minn.

My Commission expires Nov. 29, 1922.

9 STATE OF MINNESOTA,
County of Hennepin:

Municipal Court, City of Minneapolis.

C. E. SCHAFF, as Receiver of the Missouri, Kansas & Texas Railway Company, a Corporation, Plaintiff,

vs.

J. C. FAMECHON COMPANY, a Corporation, Defendant.

Findings, Conclusions, and Order for Judgment.

The above entitled action, having been regularly placed upon the calendar, came before the Court for trial without a jury on the 20th day of February, 1919, D. R. Frost, Esq., appeared as attorney for plaintiff, and Charles B. Elliott, Esq., and George H. Smith, Esq., appeared as attorneys for the defendant.

Now, after hearing the arguments of counsel and duly considering the same, and the evidence and the stipulations of facts made in writing and orally during the trial, and the files and records herein, and being fully advised in the premises, the Court finds as,

Matters of Fact.

I.

That the defendant is, and at all the times named in the complaint herein was, a corporation duly existing and engaged in business in the city of Minneapolis, Minnesota.

II.

That at the times referred to in the complaint and answer herein, the Missouri, Kansas & Texas Railway Company was a corporation owning and engaged in operating a railroad line between different states, and as such was and is subject to the laws of Congress regulating interstate commerce. That on the 27th day of September, 1915, in an action then pending in the District Court of the United States for the Eastern Division of the Eastern District of Missouri,
said district court having jurisdiction of the parties and of
10 the subject matter of said action, by an order duly made and
filed, appointed the plaintiff herein, Receiver of said Missouri, Kansas & Texas Railway Company, and all of its property, choses in action, assets and effects. That on the same day the plaintiff duly qualified and assumed the duties as such receiver and took possession of all the property, choses in action, assets and effects of the said Missouri, Kansas & Texas Railway Company, and ever since said 27th day of September, 1915, he has been and still is the duly qualified

receiver of said railroad company and in actual possession and control of all its property, choses in action, assets and effects.

That said District Court, by its order duly made and filed, directed and authorized the plaintiff to collect all the assets due the said railroad company, by suit or otherwise and that plaintiff, by said District Court order, is duly authorized to bring this action.

III.

That at the times herein mentioned the Missouri, Kansas & Texas Railway Company, and the connecting carriers that participated in the transportation of the shipments hereinafter mentioned, had filed with the Interstate Commerce Commission, joint through tariffs showing the carload rates for the transportation of potatoes from the points of origin to the points of destination hereinafter mentioned. That such joint through tariffs had been duly published as required by law, and were in effect at the time of the shipments hereinafter referred to.

11 IV.

That under the provisions of said joint through tariffs, no rental charge for the use of refrigerator or other insulated equipment, when loaded with potatoes of origin to the points of destination, hereinafter referred to, was named or mentioned.

V.

That heretofore on January 2, 1908, the Interstate Commerce Commission, pursuant to authority conferred upon it by Sec. 6 of the Interstate Commerce Law as amended by the Act of June 29, 1906, duly enacted and published a rule which provided as follows:

"Every carrier subject to the provisions of the act to regulate commerce which files freight or passenger tariffs shall place in the hands and custody of its agent or other representative at every station, warehouse, or office at which passengers or freight are received for transportation, and at which a station agent or a freight agent or a ticket agent is employed, all of the rate and fare schedules which contain rates and fares applying from that station, or terminal or other charges applicable at that station, including the schedules issued by that carrier or by its authorized agent and those in which it has concurred."

That said requirement providing for the manner of publication of the schedules of tariffs and charges of carriers engaged in interstate commerce was in force from and after January 1, 1909, and has been in force during all the time since that date.

That the several stations from which the shipments hereinafter referred to were made were stations at which freight was re-
12 ceived for transportation and at which freight agents were employed.

VI.

That under the provisions of aforesaid joint through tariffs, they were governed by Southwestern Lines' Classification Exceptions and Rules Circulars. That these exceptions and rules circulars were placed in the hands and custody of agents at the stations of destination of shipments hereinafter referred to, and were on file at such stations, but were not placed in the hands and custody of agents at the stations of origin of the shipments hereinafter referred to, and were not on file at such stations, as provided by the Act to Regulate Commerce and the aforesaid rule of the Interstate Commerce Commission.

VII.

That at the times hereinafter mentioned, the joint through tariffs referred to in finding III, did not contain any reference by I. C. C. number to Western Trunk Line Circular No. 12, and supplements thereto.

VIII.

That the said Southwestern Lines Classification Exceptions and Rules Circulars did not contain any reference by I. C. C. number to Western Trunk Line Circular No. 12. That an indirect reference was contained in the said Southwestern Classification Exceptions and Rules Circulars to a rental charge by the following provision, but, as stated in finding VI, it was not in the hands and custody of agents at the stations of origin of the shipments hereinafter referred to and not on file at such stations:

13 "Shipments under the rates, rules and regulations prescribed in this tariff, and in tariffs made subject to this tariff, shall be subject to such further charges and allowances as are prescribed in publications of the participating carriers, lawfully on file with the Interstate Commerce Commission, relating to * * * rental charges. * * *

IX.

That Western Trunk Line Circular No. 12 was participated in by the initial and delivering carriers of the shipments hereinafter referred to, and contained the following rule, to wit:

"When shipper orders a refrigerator or other insulated car, to be heated by him or to move without heat, a charge of $5 per car per trip will be made for the use of car, and will accrue to the owner thereof."

That the said Western Trunk Line Circular was the only tariff which contained a rental charge for the use of refrigerator or other insulated cars when loaded with potatoes, but that such rental charge was not a part of the joint through tariffs referred to in finding III,

the same having been referred to only as shown in finding VI, to wit, in the Southwestern Lines Classification Exceptions and Rules Circulars, which were not in the hands and custody of agents at the points of origin of the shipments hereinafter referred to, and were not on file at such stations, as required by the act to regulate commerce and in conformity with the aforesaid rule of the Interstate Commerce Commission.

14 X.

That in the year 1915, at the defendant's request, the Missouri, Kansas & Texas Railway Company received refrigerator cars loaded with potatoes, which cars had been ordered for loading by the several shippers thereof, for transportation and delivery to the stations hereinafter mentioned, on the line of the said Missouri, Kansas & Texas Railway. That said cars were duly transported and delivered, and that the car number, initial, date of origin of shipment, point of origin, point of destination of each car is as follows:

No.	Initial.	Date.	Point of origin.	Point of destination.
96837	N. P.....	Jan. 21, '15.	Rush City, Minn.	Oklahoma City, Okla.
56510	G. N.....	Feb. 25, '15.	Grasston, Minn.	Muskogee, Okla.
37393	C. B. & Q.....	Mar. 1, '15.	Isanti, Minn.	McAllister, Okla.
51644	G. N.....	Mar. 12, '15.	Bock, Minn.	Sulphur Springs, Tex.

That under the Act of Congress it was the duty of the said Missouri, Kansas & Texas Railway Company, as the delivering carrier, to collect the rates and charges as set forth in the tariffs and schedules which had been legally published and established. That the said Missouri, Kansas & Texas Railway Company collected, and the defendant paid, in addition to the regular rates which had been established for transportation of said commodities, a car rental charge of $5 per car, for the use of the refrigerator cars so furnished,
15 and that said payments were made on the demand of the said Missouri, Kansas & Texas Railway Company, and were exacted by said Company as a condition precedent to the delivery of the said cars and the contents thereof. That thereafter, the defendant made claims against the said Missouri, Kansas & Texas Railway Company for an overcharge of $5 in respect to each of the above named shipments, alleging and asserting that under the law and the tariffs and schedules of the said Missouri, Kansas & Texas Railway Company, said $5 car rental for said refrigerator cars was not legally collectible, and that the said charge had been improperly and illegally assessed and collected. That thereupon, the said Missouri, Kansas & Texas Railway company, after investigation, properly refunded to the defendant the sum of $20 which had been collected as above stated, as car rental for the use of the refrigerator cars on the four shipments hereinbefore specifically described.

XI.

That on October 26, 1914, at Rush City, Minnesota, on the line of the Northern Pacific Railway Company, the defendant delivered to

said Railway Company a shipment of potatoes loaded in refrigerator car, N. P. 96574, billed and consigned for transportation over the line of said Railway Company and connecting carriers, including the Missouri, Kansas & Texas Railway Company, to Muskogee, Okla., upon the understanding and agreement that said Northern Pacific Railway Company, and its connecting carriers, should transport said shipment to Muskogee, Oklahoma, and deliver the same and
16 that defendant would pay the legal transportation charges. That said shipment was duly transported and said Missouri, Kansas & Texas Railway Company received said shipment and duly transported the same and delivered it at Muskogee, Oklahoma. That the shipper of said potatoes ordered a refrigerator car for use in the transportation of said shipment. That no charge of $5 per car for the rent and use of said car was made by the plaintiff or collected from the defendant.

XII.

That during the year 1916, there were delivered to the plaintiff on behalf of the defendant, by carriers connecting with plaintiff, two carloads of potatoes for transportation by plaintiff from the place of such delivery to Coalgate, Oklahoma, and Durant, Oklahoma, respectively. That the plaintiff received said two carloads of potatoes from said connecting carriers and undertook and agreed with defendant to transport the same, and at the points hereinafter designated to deliver the same to defendant or to such party as defendant should designate, at the lawfully established rate for such transportation. That the following statement shows the car number and its initial, date of shipment, point of origin, and destination of said shipments, to wit:

No.	Date.	Initial.	Origin.	Destination.
37705	Feb. 22, '16.	C. B. & Q.....	Grasston, Minn.	Coalgate, Okla.
53682	Feb. 24, '16.	G. N.....	Isanti, Minn.	Durant, Okla.

17 XIII.

That pursuant to said understanding, the plaintiff did transport said two carloads of potatoes as aforesaid, but in violation of its agreement and duty, refused to deliver the same to the defendant or to the party designated by defendant without the payment, on each car, of the sum of $5 in excess of the lawful rate for such transportation, carriage, and delivery, the said $5 for each car being claimed and demanded as rental for the refrigerator cars in which said potatoes were shipped. That said $5 charge for rental of refrigerator cars so demanded and collected by the plaintiff was claimed to be payable and collectible under the rule contained in Western Trunk Line Circular No. 12, and supplements thereto, and not otherwise.

That by reason of the refusal of the plaintiff to deliver the said two carloads of potatoes as alleged and in order to secure delivery of said potatoes, the defendant was compelled to and did pay plaintiff said overcharge of $5 on each of said cars, and that though de-

manded, the said plaintiff has failed and refused, and still fails and refuses to adjust, tender or pay to defendant the said overcharge.

That at the time the payment of the said $5 on each of said cars was exacted and collected, neither the initial carriers, nor either of the carriers that participated in said shipments in question had ever published and legally established any such charge applicable at the stations of origin of said shipments, or either of them.

18 XIV.

That on the dates of the various shipments hereinbefore referred to, a refrigerator car was, and during the cold weather season was and is, the only proper and suitable car in which to ship and transport potatoes from and through the state of Minnesota, and adjoining states.

From the foregoing facts the court finds as

Conclusions of Law.

I.

That no charge of $5 per car for the rent and use of refrigerator or insulated cars for the shipment of potatoes was ever legally established as applicable at the stations of origin of the various shipments referred to in the plaintiff's complaint and in the counterclaim set out in the defendant's answer; and that no charge for rental of refrigerator or other insulated cars was ever published and established at said stations or either thereof, and applicable to the shipments in question.

II.

That the Missouri, Kansas & Texas Railway Company had no legal right to exact and collect a charge of $5 as rental for each refrigerator car used in the shipments of potatoes described in detail in the X finding of facts herein, or any charge therefor in excess of the legal rate per hundred pounds for the transportation of potatoes; that the charge of $5 per car was illegally exacted and collected and consisted of an overcharge on each shipment and that the said sum of $5 so collected on each of said cars was properly and legally returned to the shipper.

19 III.

That the plaintiff is not entitled to judgment against the defendant for any sum whatever.

IV.

That the defendant is entitled to judgment against the plaintiff for the sum of $10, with interest thereon, at six per cent per annum from March 30th, 1916, and for its costs and disbursements herein.

Let judgment be entered accordingly.
Dated this 10th day of May, 1919.
By the Court.

MATHIAS BALDWIN,
Judge.

(Endorsed:) Filed May 15, 1919. Harry Moore, clerk, by C. A. Eck, deputy.

STATE OF MINNESOTA,
County of Hennepin:

Municipal Court, City of Minneapolis.

C. E. SCHAFF, as Receiver of the Missouri, Kansas & Texas Railway Company, a Corporation, Plaintiff,

vs.

J. C. FAMECHON COMPANY, a Corporation, Defendant.

Motion for Amended Findings or New Trial.

To the above-named defendant and to Messrs. George H. Smith and Charles B. Elliott, attorneys for said defendant:

Please take notice that at the Municipal Court Rooms in the Court House, city of Minneapolis, Minnesota, at a special term of the Court, appointed to be held on the third day of June, 1919, at two o'clock in the afternoon of said day, the above named plaintiff will, at the opening of the Court on said day or as soon thereafter as counsel can be heard, apply to and move the Court on the minutes of the Court, the stenographic notes of the Court reporter
20 taken at the trial and upon all the files and records herein, together with this notice, for an order to amend the findings of fact and conclusions of law of the Court in the above named cause, as follows:

I.

To add and insert in the finding of fact numbered III (at the end thereof), the following:

"That at the times herein mentioned said Missouri, Kansas and Texas Railway Company, and the said connecting carriers had filed with the Interstate Commerce Commission and had printed Southwestern Lines Exceptions and Rules Circulars and certain supplements thereto, and likewise had filed with the Interstate Commerce Commission and had printed Western Trunk Line Circular No. 12, and certain supplements thereto."

II.

To strike out all of finding of fact numbered IV.

III.

To strike out all of finding of fact numbered V, except the last sentence of said finding numbered V.

IV.

To strike out from finding of fact numbered VI, the following:

"As provided by the Act to Regulate Commerce and the aforesaid rule of the Interstate Commerce Commission."

V.

To add to finding of fact numbered VI (after the words "were not on file at such stations"), the following:

21 "Said Exceptions and Rules Circulars and Supplements were kept in complete files of tariffs by the Railway Companies on whose lines the shipments herein referred to originated at designated offices in the cities named in the regulations of the Interstate Commerce Commission, effective June 2, 1908, Defendant's Exhibit No. 2, and in the regulations of the Interstate Commerce Commission, effective October 12, 1915, Defendant's Exhibit No. 3, that were on the railway lines of said initial carriers. That the Northern Pacific Railway Company kept said Exceptions and Rules Circulars and Supplements on file at designated offices in the following cities on its railway line:

St. Paul and Minneapolis, Minn.
Helena, Montana.
Portland, Oregon.
Seattle, Washington.

That the Great Northern Railway Company kept such Exceptions and Rules Circulars and Supplements at designated offices in the following cities on its railway line:

St. Paul and Minneapolis, Minn.
Sioux City, Iowa.
Helena, Montana.
Portland, Oregon.
Seattle, Washington."

VI.

To strike out all of finding of fact numbered VII.

VII.

To strike out all of finding of fact numbered VIII, and to insert instead thereof, the following:

"Said Southwestern Lines Classification Exceptions and
22 Rules Circulars contained the following item:

Application of Individual Tariffs Containing Additional Charges and Allowances:

Shipments transported under the Rates, Rules, and Regulations prescribed in this Tariff, and in Tariffs made subject to this Tariff, shall be subject to such further charges and allowances as are prescribed in publications of the participating carriers lawfully on file with the Interstate Commerce Commission relating to:

Bedding of live stock, brokerage, bulk-heading of cars, capacity of cars, caretakers, car crating, car lining, car rental, car service, cartage, changing destination, concentration, customs duties, demurrage, dimension of cars, dipping, diversion drayage, dunnage, elevation, equipment allowance, estimated weights, feed, feeding in transit, freight transported by passenger train, furnishing cars of greater or less capacity than ordered by shipper, hay for packing, icing refrigerator cars, litherage, loading, Marine insurance, market privileges, minimum charge, minimum weight, overloading or shifting of load, premium packages, preservatives, racking and stripping of refrigerator cars containing dairy products, reconsignment, refrigeration, remnant shipments, rental charges, shrinkage, stop-over privileges, storage, stoves in cars, straw used for packing, switching, temporary partitions, terminal charges, trackage, transfer, transit privileges, transportation of freight in defective cars, transportation of freight in newly built cars, transportation of freight in re-built cars, unloading, use of two cars when one has
23 been ordered, ventilation, watering of live stock, wharfage."

VIII.

To strike out from finding of fact numbered IX, the following:

"That the said Western Trunk Line Circular No. 12 was the only tariff, which contained a rental charge for the use of refrigerator or other insulated cars when loaded with potatoes, but that such rental charge was not a part of the joint through tariffs referred to in finding III, the same having been referred to only as shown in finding VI, to-wit, in the Southwestern Lines Classification Exceptions and Rules Circulars, which were not in the hands and custody of agents at the points of origin of the shipments hereinafter referred to, and were not on file at such stations, as required by the Act to Regulate Commerce and in conformity with the aforesaid rule of the Interstate Commerce Commission."

IX.

To insert in finding of fact numbered IX (after the words "accrue to the owner thereof") the following:

"That at the times herein mentioned the Missouri, Kansas & Texas Railway Company had placed in the hands and custody of the agents at the stations of destination of the shipments hereinafter mentioned, copies of Western Trunk Line Circular No. 12, and supplements thereto, except that no copies were kept at the stations of destination of the shipments mentioned in the counterclaim of de-
24 fendant or at Sulphur Springs, Texas. Copies of such

Western Trunk Line Circular No. 12, and supplements thereto, were in the hands and custody of the agents of all the stations of origin of the shipments herein mentioned. The Missouri, Kansas & Texas Railway Company, at the times hereinafter mentioned, also kept said Western Trunk Line Circular No. 12, and supplements in its complete files of tariffs at designated offices in the following cities on its railway line:

Kansas City, Missouri.
St. Louis, Missouri.
Oklahoma City, Oklahoma."

X.

To strike out from finding of fact numbered X, in the first sentence of said finding, the following:

"Which cars had been ordered for loading by the several shippers thereof."

And to insert in said finding of fact numbered X (at the end of the first sentence thereof) the following:

"The several shippers of said refrigerator cars each had ordered a refrigerator car for loading."

XI.

To strike out from finding of fact numbered X, the following:

"That the said Missouri, Kansas & Texas Railway Company collected, and the defendant paid, in addition to the regular rates which had been established for transportation of said commodities, a car rental charge of $5 per car, for the use of the refrigerator cars so furnished, and that said payments were made on the demand of the said Missouri, Kansas & Texas Railway Company, and were exacted by said Company as a condition precedent to the delivery of the said cars and the contents thereof."

And to insert in said finding of fact numbered X instead, the following:

"That the said Missouri, Kansas & Texas Railway Company collected as a part of the through transportation charges a car rental charge of $5 per car for the use of the refrigerator cars so furnished and loaded."

XII.

To strike out from finding of fact numbered X in the last sentence of said finding, the word "properly."

XIII.

To strike out from finding of fact numbered XI, in the last sentence of said finding, the following words: "made by the plaintiff or."

XIV.

To insert in finding of fact numbered XII (after the first sentence), the following:

"Said shipments were loaded in refrigerator cars and refrigerator cars had been ordered for loading by the respective shippers of said two cars."

XV.

To strike out all of finding of fact numbered XIII and to insert instead of said finding numbered XIII, the following:

"That pursuant to said understanding, plaintiff did transport said two carloads of potatoes as aforesaid and collected on each car, as a part of the through transportation charges, the sum of $5 as car rental for the use of the refrigerator cars which had been ordered for loading and used in the transportation."

XVI.

To strike out all of finding of fact numbered XIV.

XVII.

To strike out conclusion of law numbered I. And to insert instead thereof, the following:

I.

"That a charge of $5.00 per car for the rent and use of a refrigerator car for the shipment of potatoes was legally in effect and was applicable at the stations of origin of the shipments referred to in the plaintiff's complaint and in the counterclaim in defendant's answer."

XVIII.

To strike out all of conclusions of law numbered II, numbered III, and numbered IV. And to insert instead thereof the following:

"That plaintiff is entitled to judgment against the defendant for the sum of twenty-five dollars ($25.00), with interest at 6 per cent per annum on ten dollars ($10.00) from ——— and on ten dollars ($10.00) from ——— and for its costs and disbursements herein."

Let judgment be entered accordingly.

And if the above named amendments of the findings of fact and conclusions of law are denied, then at the same time and place this plaintiff, upon the minutes of the Court and all the files and records herein, together with this notice, will apply to and move the Court for an order vacating the decision of the Court and granting
27 a new trial on the following grounds:

I.

That the decision is not justified by the evidence.

II.

That the decision is contrary to law.

III.

Errors of law occurring at the trial and duly excepted to by the defendant.

D. R. FROST,
Attorney for Plaintiff.

(Endorsed:) Filed June 2, 1919. Harry Moore, clerk, by C. A. Eek, deputy.

STATE OF MINNESOTA,
County of Hennepin:

Municipal Court, City of Minneapolis.

C. E. SCHAFF, as Receiver of the Missouri, Kansas & Texas Railway Company, a Corporation, Plaintiff,

vs.

J. C. FAMECHON COMPANY, Defendant.

Order.

The above entitled matter came on to be heard before the Court, in Chambers, on the third day of June, 1919, on motion of the plaintiff to amend the findings of fact and conclusions of law or for a new trial as indicated in the notice of motion on file herein.

D. R. Frost, Esq., appeared on behalf of the plaintiff in support of said motion, and George Harold Smith, and C. B. Elliott, Esqs., appeared for the defendant in opposition thereto.

It was stipulated on the argument by said parties that the following amendment to the findings of fact be permitted, and the said findings of fact are hereby amended to contain the following; and to be designated as paragraph 6-A, of said findings of fact:
28 Said exceptions and rules circulars and supplements were on file at the designated offices of the Great Northern Railway

Company in the following cities: Minneapolis and St. Paul, Minnesota; Sioux City, Iowa; Helena, Montana; Portland, Oregon, and Seattle, Washington; and were on file at the designated offices of the Northern Pacific Railway Company in the same cities, excepting Sioux City, Iowa; and that the shipments mentioned in the complaint and counterclaim originated on said Railway Companies' Lines, but not at any of the cities above mentioned.

Except as above the motion of the plaintiff to amend the findings of fact and conclusions of law, and the alternative motion for a new trial is in all things denied.

Dated June 28, 1919.

By the Court.

MATHIAS BALDWIN,
Judge.

(Endorsed:) Filed June 30, 1919. Harry Moore, clerk, by C. A. Eck, deputy.

STATE OF MINNESOTA,
County of Hennepin:

Municipal Court, City of Minneapolis.

C. E. SCHAFF, as Receiver of the Missouri, Kansas & Texas Railway Company, a Corporation, Plaintiff,

vs.

J. C. FAMECHON COMPANY, a Corporation, Defendant.

Judgment, Aug. 5, 1919.

This cause came on for trial at a regular term of the above named Court, held on Tuesday, the 3rd day of Sept., A. D. 1918, and was tried by the Court without a jury, on the 20th day of February, A. D. 1919, and the Court after hearing the evidence adduced at said trial, and being fully advised in the premises, did on the 15th day
29 of May, A. D. 1919, duly make and file its findings and order for judgment herein.

Now, therefore, in accordance with said order, and on motion of G. H. Smith, plaintiff's attorney, it is hereby adjudged that the defendant recover of the plaintiff the sum of eleven and 95/100 dollars the amount found due, and interest with eleven and 36/100 dollars, costs and disbursements, as taxed and allowed, amounting in all to the sum of twenty-three and 31/100 dollars.

By the court.

HARRY MOORE,
Clerk of the Municipal Court.
By AL. DRETCHKO,
Deputy.

Endorsed: Filed Aug. 5, 1919.

STATE OF MINNESOTA,
County of Hennepin:

Municipal Court, City of Minneapolis.

C. E. SCHAFF, as Receiver of the Missouri, Kansas & Texas Railway Company, a Corporation, Plaintiff,

vs.

J. C. FAMECHON COMPANY, a Corporation, Defendant.

Notice of Appeal.

To the above-named defendant and to Messrs. Charles B. Elliott and George H. Smith, attorneys for said defendant, and to H. Moore, clerk of the above court:

You and each of you will please take notice that the plaintiff, C. E. Schaff, as receiver of the Missouri, Kansas & Texas Railway Company, a corporation, appeals to the Supreme Court of the state of Minnesota, from the judgment in favor of the defendant and against said plaintiff in the sum of $23.31, rendered and entered on the 5th day of August, 1919, and from the whole thereof.

D. R. FROST,
Attorney for Plaintiff.

30 (Endorsed:) Filed August 27, 1919. Harry Moore, clerk, by C. A. Eck, deputy.

STATE OF MINNESOTA,
County of Hennepin:

Municipal Court, City of Minneapolis.

C. E. SCHAFF, as Receiver of the Missouri, Kansas & Texas Railway Company, a Corporation, Plaintiff,

vs

J. C. FAMECHON COMPANY, a Corporation, Defendant.

Settled Case.

The above entitled cause came regularly on for trial and tried before Hon. Mathias Baldwin, one of the Judges of said Court, without a jury, on the 20th day of February, 1919, D. R. Frost, Esq., appearing as attorney for the plaintiff, and Messrs. C. B. Elliott, and G. H. Smith appearing as attorneys for the defendant, whereupon the following proceedings were had and taken:

Mr. Frost made the opening statement to the Court in behalf of the plaintiff.

The Court: This action is on the original claim, is it?

Mr. Frost: Yes, if the Court please. The law as we will brief it is, that if the refund was made when, as a matter of fact, the legal rate and the legal charges should have included the five dollar charge, car rental charge, then the plaintiff can maintain this action, these, all of them, being interstate commerce shipments, the United States decisions are applicable and would be controlling. The first cause of action is to recover the five-dollar charge on each of the four cars mentioned in the complaint.

Mr. Smith: I am afraid from the remark made by the Court that Your Honor got the idea that this was to recover a rebate or charge which had already been paid.

31 The Court: That was the question that was in my mind, as to whether——

Mr. Smith: From your remark, I thought you misunderstood.

Mr. Frost: This is being litigated here on the theory that this is a charge which has not been paid.

Mr. Smith: It has been paid and was returned and now they want it back again.

The Court: It was paid under mistake?

Mr. Elliott: They collected it, paid it back, and now they want it back again.

The Court: Yes, I see.

Mr. Frost: That is the theory of the case, and as far as the law is concerned, as we will brief it, it will be immaterial whether the charge had been paid in the first place or whether it had been refunded through error or mistake or anything else.

The Court: In any event, it isn't claimed here that this action is an action to recover money paid through error, at least, it is not being tried on that theory.

Mr. Elliott: It comes right down to the question of the validity of the original charge.

The Court: Yes, I see.

Mr. Frost: Now, while the answer denies quite a number of the allegations, we have made a stipulation that covers a substantial part of the proof here, and at this time I will read the stipulation; and after reading that, I will make a stipulation or concession in respect to the two cars in the answer.

Mr. Elliott: You are offering now the stipulation in evidence?

32 Mr. Frost: Yes. "It is hereby stipulated between the parties to the above entitled action that for the purposes of the trial the statements herein contained are facts:

1. The defendant made the carload shipments of potatoes mentioned in the causes of action of the complaint from the points of origin therein mentioned, to the destinations mentioned and also made the shipments of potatoes described in the counterclaim set forth in the defendant's answer from the points of origin mentioned in the said counterclaim to the destinations therein mentioned.

2. The plaintiff will secure and have at the trial either the original bills of lading of all of the said shipments or the station carbon copies thereof, and if the plaintiff should not have either the original

or the station carbon copies the defendant has the privilege of putting in evidence its memorandum carbon copies of the said bills of lading for any purpose other than that stipulated under paragraph 1 hereof."

Of course, it will develop, if the Court please, that plaintiff has here the original copies of the bills of lading for all shipments involved. And in connection with that paragraph of the stipulation, Mr. Smith or Judge Elliott, can it be stipulated right here that the shipments were shippers' protective shipments?

Mr. Smith: Under option No. 1, do you mean?

Mr. Frost: Under option No. 1.

Mr. Smith: I would rather that stipulation would read, it appears from the bills of lading.

33 Mr. Frost: How is that?

Mr. Smith: That it appears from the bills of lading that they were all shipped. I don't concede that they were, but it appears from the bills of lading that they were.

Mr. Elliott: That they probably were.

Mr. Frost: There isn't any claim here of paying any charges for heater protective service on any of these.

Mr. Elliott: The stipulation is that it appears on the bills of lading that they are under option No. 1.

Mr. Frost: Yes.

Mr. Elliott: That there was nothing paid for heater service.

Mr. Frost: Yes.

Mr. Elliott: To the initial carriers.

Mr. Frost: Now, if counsel are willing, I would like to have an objection to that as to its materiality. If you don't want me to object to anything in the stipulation, why——

Mr. Elliott: Which one is that?

Mr. Frost: Paragraph 4.

Mr. Smith: I understood you yesterday, Mr. Frost, that there was to be no objection whatever to the testimony that refrigerator car or an insulated car was a proper car at this time of the year in this section of country—isn't that so?

Mr. Frost: Well, then, we misunderstood each other. I won't make any objection to that, but I thought you asked me if there was going to be any dispute on that, and I said I wasn't going to have any evidence to the contrary.

34 Mr. Smith: I thought there would be no objection to that testimony.

(Counsel confer.)

Mr. Frost: "The cars furnished by the initial carrier and loaded, were refrigerator or other insulated cars, and an order for refrigerator or other insulated cars for each shipment had been duly filed with the carrier at the points of origin.

4. "The initial carriers, at the time of the shipments involved in this action, refused to accept carload potato shipments for movement under Carriers' Protective Service unless refrigerator or other insulated cars were used for loading.

5. "Upon the arrival of each of the four shipments mentioned in the first cause of action of the complaint at the respective destinations, the transportation charges were collected by and paid to the M. K. & T. Railway Company, upon the following basis, to-wit: Charges figured upon the regular established freight rate per hundred weight for potato shipments in carload lots, and in addition thereto there was collected and paid in each instance, rental charge of $5.00 per car.

"Afterwards defendant made claims upon the M. K. & T. Railway Company on each of the four cars for a refund of the said charge of $5 for car rental, alleging as a cause for the refund that the freight tariffs of the M. K. & T. Railway Company and of its connecting carriers who participated in moving the shipments, did not lawfully provide for the said charge, and thereafter, payments were made the defendant of $5.00 each by the M. K. & T. Railway Company as follows:

35 On cars 96837, 51664, January 18, 1916.
On cars 50310, 37393, February 1, 1916.

"Upon arrival of car N. P. 96574, shipped from Rush City, Minnesota, to Muskogee, Oklahoma, the M. K. & T. Railway Company collected from the defendant, or defendant's agent, the freight charges based upon the regularly established freight rate per hundred weight on carload shipments of potatoes from Rush City to Muskogee, but there was not collected any charge for car rental of the refrigerator or insulated car, and no such charge was shown on the freight receipt issued at Muskogee by the M. K. & T. Railway Company."

6. "Upon arrival of the carload potato shipments mentioned in the counterclaim of the defendant's answer, the M. K. & T. Railway Company collected a car rental charge of $5 in addition to the freight charges figured upon the regularly established freight rate per hundred weight for potato shipments in carload lots.

7. "The tariffs and circulars hereinafter referred to, prior to the dates of the shipments mentioned in the causes of action in the complaint and answer, had been printed and duly filed with the Interstate Commerce Commission.

8. "The Western Trunk Line Circular No. 12, and supplements thereto, was on file during the time of the shipments involved in this action in the stations of the initial carrier from which such shipments were made, and at the stations to which deliveries were made, except that same was not on file at the station at Sulphur Springs, Texas. The question whether the same was on file at the sta-
36 tions mentioned in the counter claim is not determined by this stipulation, but is left open for consideration.

It is further stipulated——

The Court: That is outside of the printed stipulation?

Mr Frost: Yes. It is stipulated now that this Western Trunk Line Circular No. 12, and the supplements thereto, were not on file

at stations of destination of shipment referred to in the counterclaim in the answer at the time those shipments originated and moved.

The Court: That has reference to the counterclaim?

Mr. Elliott: That is, in compliance with the last clause of paragraph 8.

The Court: That just refers to the cars mentioned in the counterclaim?

Mr. Frost: Yes.

Mr. Frost: 9. "That Western Trunk Line Circular No. 12 and supplements thereto, was the only tariff issued by any of the carriers participating in the transportation of the shipments involved in this action, which contained the $5 rental charge for the use of refrigerator or other insulated cars."

Mr. Elliott: We have stipulated there that certain tariffs were and were not on file at certain stations.

Mr. Frost: Yes.

Mr. Elliott: But that stipulation, of course, doesn't intend to waive the right to object that any particular tariff or circular was not on file in some other station, if it becomes material in this case.

37 Is that the understanding?

Mr. Frost: How is that? Do you mean it wasn't on file at some other station?

Mr. Elliott: Yes. There is nothing here to prevent either of us showing that certain tariffs not covered by these stipulated cases—of course, the stipulation goes to specific cases—was or was not on file at certain named stations. I understand it is not the intention of either of us to waive the right to raise the objection that some tariff was not on file at some other station.

Mr. Smith: To show that these same tariffs were not on file at other stations than those stipulated.

(Counsel confer.)

10. "That the tariffs and supplements thereto containing the freight rates per hundred pounds on carload shipments of potatoes between the points of origin mentioned in the complaint and in the counter-claim contained in the answer, and the respective destinations therein mentioned, were, on the dates of the said shipments, kept on file at the stations of origin of all the shipments and at the respective stations of destinations.

11. "The Southwestern Line's Exceptions and Rules Circulars and supplements thereto, was on file at the stations of destination mentioned in the causes of action of the complaint, but was not kept and was not on file at the stations of origin of the said shipments.

12. "That either party may offer in evidence any tariff or tariff circular in addition to the Western Trunk Line Circular No. 12, and supplements thereto, filed with the Interstate Commerce Com-

38 mission by any of the carriers who participated in the carriage of the shipments in question, without the same being

certified by the Interstate Commerce Commission and the same may be received in evidence, provided that Circular 12, or any other tariff or circular, is not incompetent or immaterial on other grounds. The right is reserved by both parties to object to any tariff or circular on any grounds of competency or materiality other than want of certification or printing or filing with the Interstate Commerce Commission, or proof of the said tariffs or circulars being kept or not kept on file at the particular railway stations as already stipulated herein.

13. "Prior to the starting of this action, the M. K. & T. Railway Company, according to the traffic and accounting arrangements existing between it and the initial carriers of the shipments involved in the complaint and the counterclaim of the answer, had duly paid all of the $5 car rental charges herein involved, to the respective initial carriers under the said traffic and accounting arrangements."

Mr. Elliott: All right, let it stand. I think we understand each other.

The Court: Have you a copy of this stipulation, or may I have it?

Mr. Frost: Yes. It should be marked as an exhibit.

(Stipulation marked for identification as Plaintiff's Exhibit A, received in evidence.)

Adjournment.

(Afternoon Session, February 20, 1919.

39 Mr. Elliott: If the Court please, in connection with the talk this morning about the stipulation, I made a remark that might be misconstrued. There is no intent on the part of anyone here to waive any question of law.

The Court: The impression I got was that you were waiving technicalities, with a view to getting to the meat of the thing as soon as possible. That is the impression I got.

Mr. Elliott: Yes. But I don't want the record to show any waiver on our part.

Mr. Frost: Plaintiff's Exhibit A may be considered as having been offered in evidence and having been received, may it?

Mr. Elliott: As the written stipulation?

Mr. Frost: Yes, sir.

HARRY M. RUSSELL sworn:

By Mr. Frost:

Q. What is your business, Mr. Russell?

A. Freight rate clerk.

Q. Of the Northern Pacific?

A. Yes, sir.

Q. How long have you been rate clerk?

A. I have been a rate clerk nearly twenty years, but not with this company.

Q. What does your work consist of with reference to railway tariffs?

A. Rating claims from tariffs furnished by the company.

Q. Have you with you a printed tariff—Southwestern Lines Tariff No. 15-G?

A. Yes, sir.

40 Mr. Frost: If the Court please, in framing my questions I am likely to refer to a tariff as effective at a certain time, or applicable on a certain date, and I don't want counsel precluded from pointing out any defect in the legality of the tariff by reason of their waiving objection to the use of the work "effective" or "applicable" as if it might be some conclusion of the witness.

Mr. Elliott: You mean by that, that it is written on the face of it, "effective"?

Mr. Frost: Yes.

Q. Will you give us the I. C. C. number of that tariff?

A. I. C. C. No. 969.

Q. Is that referred to as Leland's I. C. C. No. 969, or just I. C. C. No. 969?

A. It is F. A. Leland's I. C. C. No. 969.

Q. Was that tariff effective January 21, 1915?

A. Yes, sir.

Mr. Frost: You don't require proof that Rush City was a Northern Pacific station, do you?

Mr. Smith: No.

Q. Can you show in tariff 15-G, the concurrence of the Northern Pacific Railway Company, and of the M. K. & T. Railway Company?

A. Yes, sir.

Q. Give us the reference to the page and to the item?

A. Northern Pacific concurrence No. FX8 No. 10, is shown on page XI.

Q. And the M. K. & T.'s concurrence?

A. The M. K. & T. concurrence FX1, No. 21 is shown on page X.

41 The Court: You might explain right there, what you mean by "concurrence" in this connection.

Witness: It is the authority of the Northern Pacific and the M. K. & T., allowing Mr. Leland to show them as participating in this tariff.

Mr. Frost: It is stipulated that tariff 15-G was concurred in by the Northern Pacific, the M. K. & T. and the Great Northern Companies?

Mr. Elliott: Yes, but we don't want to be estopped from putting our own construction on these tariffs.

Q. Referring to the title page of the tariff 15-G, will you read the note starting "Governed, except as otherwise provided herein?"

A. Yes, sir. "Governed, except as otherwise provided herein, by Western Classification No. 50 (F. J. Hoffman's I. C. C. No. 8), or reissues thereof; and by Southwestern Lines' Classification Exceptions and Rules Circular No. 3-H (F. A. Leland's I. C. C. No. 962, Eugene Morris' I. C. C. No. 366), or reissues thereof."

Q. Does the tariff that you have identified contain the carload freight rate per hundred pounds on potato shipments originating January 21, 1915, from Rush City, Minnesota, to Oklahoma City, Oklahoma?

A. Yes, sir.

Q. I call your attention to Leland's Southwestern Lines' Classification Exceptions and Rules Circular No. 3-J. Will you please produce that tariff?

(Witness produces a tariff.)

Q. Was that tariff or circular effective January 21, 1915?

42 Mr. Smith: I object to that. Is there any question about that word "effective" there?

Mr. Frost: No. I told you that, before.

(The circular or tariff last produced by the witness was marked plaintiff's Exhibit B.)

Mr. Elliott: We want the whole of that other document from which he read, offered in evidence.

The Court: It has been offered and received, as Exhibit A.

Mr. Smith: If the Court please, Exhibit A, was a stipulation. Judge Elliott refers to the tariff.

Mr. Elliott: Yes, the tariff containing the rates.

Mr. Frost: Do you intend that we shall offer the entire tariff in evidence and that those different tariffs should be left here, and that, if a record should be made up, all of the tariffs would be——

Mr. Elliott: I think the Court ought to receive the whole document; like when you offer a set of books in evidence, you offer the books and then call attention to page so and so.

Mr. Frost: I have no objection to anything in the document being examined by the Court.

Q. I call your attention to Exhibit B. Will you please state what that is?

A. Exhibit B is a classifications exceptions and rules circular.

Q. Of what—on the face of it? "Southwestern Lines' Classification Exceptions and Rules Circular No. 3-J; I. C. C. No. 1065"; is not that correct?

A. Yes, sir.

Q. When did Exhibit B become effective?

A. It originally was effective November 30, 1914.

43 Mr. Elliott: It is understood that the word "effective" is simply printed on the face of it. We are not conceding that it was effective in the sense of being legally in force. What counsel is referring to is the date on the face of the paper.

Mr. Frost: Yes.

Q. And was that Exhibit B in effect, January 21, 1915?
A. It was.
Mr. Smith: Well——
Witness: You can't deny it; there is no denial to that question.
Q. Will you refer to item 69, page 32 of Exhibit B?

Mr. Smith: I object to that, as irrelevant, immaterial, and no foundation laid.
The Court: I suppose it is preliminary. He hasn't really asked any question yet, has he?

Q. Will you read item No. 69, in evidence?

Mr. Smith: Objected to as irrelevant, immaterial, and no foundation laid. It does not appear, so far, that this tariff 3-J, I. C. C. 1065, was ever published; and until a tariff is published it does not become effective.
The Court: I will receive it subject to the objection. If it is not connected up, we will consider it later. I presume that would be the best way.
Mr. Elliott: Now, this is something that we ought to have a definite understanding on at this time. It is stipulated here that this tariff was not on file at the station of origin. The law requires it to be on file at the place of origin. Under the stipulation itself, this circular is entirely inadmissible, and incompetent.
44 & 45 The Court reserves the ruling, and takes it subject to the objection.
The Court: Yes.

A. The subject of item 69 is "Application of individual tariffs containing additional charges and allowances."

* * * * * * *

46 Mr. Elliott: The defendant moves to strike out all of that section or part which the witness has just read into the record, on the ground that it is taken from a circular of classification, exceptions and rules that was never established. We claim it never was published by being filed or on record for inspection at the initial station involved in this case.
The Court: I will reserve the ruling on that.
Mr. Frost: I offer in evidence item No. 69, just read by the witness.
Mr. Elliott: We make the same objection; and further, that it is vague and indefinite in its terms, and even if the entire
47 document was admissible in evidence this would not be a sufficient reference to other tariffs.
The Court: It will be received subject to the objection.
Mr. Frost: Now, do I understand that you want the entire tariff in evidence?
Mr. Elliot: Well, I want you to offer "Circular" or "Rules and Regulations" so and so.
Mr. Frost: Well, I offer Exhibit B in evidence.
The Court: It will be received subject to the objection.

Q. Now, will you produce Southwestern Lines' Tariff No. 15-G?

(The document produced by the witness was marked Plaintiff's Exhibit C.)

Mr. Frost: It is stipulated that the concurrences of the Northern Pacific, Great Northern and M. K. & T., are contained in Exhibit B. Now, I want to offer in evidence the portion read by the witness from the title page of Plaintiff's Exhibit C, which is Southwestern Lines' Tariff No. 15-G.

Mr. Elliott: It is already in the record. He read it into the record.

Mr. Frost: Well, I want to offer it in evidence.

Mr. Smith: There is no objection to that.

Mr. Frost: I now offer in evidence Plaintiff's Exhibit C.

Mr. Smith: There is no objection to that.

The Court: The whole book?

Mr. Frost: Yes. Of course, the understanding is, I take it, that if we ever have to have a record made, a lot of that can 18 & 19 be eliminated.

Mr. Frost: It is stipulated that the Northern Pacific Railway Company, the Great Northern Railway Company and the M. K. & T. Railway Company were parties to Western Trunk Lines Circular No. 12.

* * * * * * *

50 Q. Will you state whether Exhibit C, contained the rate per hundredweight on carload shipments of potatoes from Grasston, Minnesota, on the Great Northern, to Muskogee, Oklahoma, on February 25, 1915?

A. It did.

Mr. Frost: It is already stipulated, is it not, that the Great Northern Railway Company was a party to Exhibit B, the exceptions and rules circular No. 3-J?

Mr. Smith: That was stipulated.

Mr. Frost: And also that the Great Northern concurred in W. T. L. tariff No. 12, that is stipulated; and we already have offered in evidence Rule 3 of Item No. 220-E.

Q. Will you state whether Exhibit C, Southwestern Lines' Tariff No. 15-G, showed the carload rate per hundredweight for potatoes, between Isanti, Minnesota, and McAllister, Oklahoma, on March 1, 1915?

A. It did.

Q. Will you refer to Exhibit B in connection with the shipment of March 1, 1915, from Isanti to McAllister, Oklahoma?

Mr. Frost: I now offer in evidence Item 69, on page 51-53 32 of Exhibit B.

Mr. Smith: Objected to as incompetent, irrelevant, immaterial, no foundation laid, and the same objection as before.

The Court: Isn't that already in evidence?

Mr. Frost: It is, if the Court please, but I have to connect that in some way with the shipment that was made on March 1st.

Mr. Smith: You can prove anything, subject to our objection. We are not raising any technical question about that. Everything goes in, subject to objection. Go ahead.

The Court: Can it be any more in evidence than it already is?

* * * * * * *

54 Mr. Frost: It is stipulated that the Northern Pacific Railway Company and the M. K. & T. Railway Company had concurred in Southwestern Lines' Classification Exceptions and Rules Circular No. 3-I.

Q. Will you state whether the freight *weight* per hundredweight on carload shipments of potatoes from Rush City, Minnesota, October 26, 1914, to Muskogee, was contained in Exhibit C?

A. It was.

Mr. Frost: I offer in evidence Plaintiff's Exhibit H, Rules Circular No. 3-I.

Mr. Smith: It is objected to as irrelevant, immaterial, and no foundation laid. The same objection, if the Court please,
55 that was made to the first offer, covers all of this; and the same objection covers every question that is asked under any of these tariffs.

The Court: All right. Received subject to the objection.

Q. When did Exhibit H become effective?

Mr. Elliot: According to the record on its face.

A. It became effective on August 27, 1914.

Mr. Frost: It is already stipulated, isn't it, that the Northern Pacific and the M. K. & T. had concurred in Western Trunk Line Circular No. 12?

Mr. Elliott: It is already in evidence.

Mr. Frost: I offer in evidence Exhibit I, being Western Trunk Lines' Circular No. 12.

Mr. Smith: Objected to as incompetent, irrelevant, immaterial, and no foundation laid.

The Court: It will be received subject to the same objection.

Mr. Elliott: If the objection to the first one is sustained, these all fall out, so the same objection runs all through.

Mr. Frost: Yes.

Mr. Frost: It is stipulated that on the dates referred to in the complaint, Rush City, Minnesota, was on the Northern Pacific Line, and that Grasston, Minnesota, Isanti, Minnesota, and Bock, Minnesota, were on the Great Northern railway line.

Mr. Elliott: And still are.

Cross-examination.

By Mr. Smith:

Q. Referring to Exhibit C, Southwestern Lines' Tariff No. 154, F. A. Leland's I. C. C. No. 969, I understood you to say that that is the tariff which contains the rate per hundred weight?

56 A. Yes, sir.

Q. Does that tariff contain the five dollar rental charge on refrigerator cars?

A. Indirectly.

Q. Does it directly?

A. It is not in this book.

The Court: What exhibit is that?

Witness: Exhibit C.

Q. Referring to Exhibit F, Leland's Southwestern Lines' Tariff No. I-I, I. C. C. No. 1052, is that the tariff that contains the freight rate on potatoes from the point of origin to point of destination in Texas?

A. Yes, sir.

Q. Does that tariff directly itself contain the five dollar rental charge on refrigerator cars?

A. No, sir.

It is stipulated that the two cars referred to in the counterclaim were shipments from Grasston, Minnesota, to Coalgate, Oklahoma, and Isanti, Minnesota, to Durant, Oklahoma, and were shipped under the same tariffs or tariffs containing similar provisions and under the same rules and regulations under which the cars in the first cause of action in the complaint were shipped, and that a five-dollar rental charge was collected from the defendant by the plaintiff on each of said cars.

Mr. Frost: And that Grasston and Isanti are Great Northern points.

By Mr. Frost:

Q. Referring to Exhibit D, being supplement No. 20 to W. T. L. No. 12, and to rule 3 of item No. 220-E, according to the

57 printed tariff was that rule No. 3 of item 220-E in effect on February 25, 1915?

Mr. Smith: Objected to as irrelevant, immaterial, and no foundation laid.

The Court: Received subject to objection.

A. It was.

Q. Will you refer to Exhibit B, being the exceptions and rules circular 3-J, item No. 69, page 32. According to the printed tariff, was that item No. 69, in effect on February 25, 1915, and on March 1, 1915?

Same objection. Same ruling.

A. Yes, sir.

Q. Will you refer to Exhibit E, being supplement No. 26 to W. T. L. tariff or circular No. 12, and to item No. 220-F, rule 3 of that item, on page 16? According to the printed tariff, was that rule No. 3 on page 16 in effect on March 12, 1915?

Same objection. Same ruling.

A. It was.

Mr. Frost: It is stipulated that the shipments covered by the complaint and by the answer were option No. 1 shipments, Shippers' Protective Service.

Plaintiff rests.

OLIVER W. TONG, sworn.

By Mr. Smith:

Q. What is your name?
A. Oliver W. Tong.
Q. What is your business?
A. I am a rate expert.
38 Q. What experience have you had in that line?
A. I have been engaged in the railroad business and business for shippers and the railroad commission since 1898. I had practically ten years' experience in the general offices of the Chicago, St. Paul, Minneapolis & Omaha Railway Company at St. Paul, a very large part of which time was spent in handling rate propositions, quotations of rates, etc. After leaving that road, I went to Montana as rate expert for the Railroad Commission of Montana. After about six and a half to seven years with that commission, I opened up a private practice in handling cases before the Interstate Commerce Commission, in representing shippers before the Interstate Commerce Commission in all traffic affairs; and I have been in Minneapolis about three years and a half, engaged in that same line of business.
Q. You heard the testimony of Mr. Russell?
A. I did.
Q. Referring to Exhibit C, which is Southwestern Lines' tariff 154-G, I. C. C. No. 969, have you that exhibit before you?
A. I have.
Q. You are familiar with that exhibit, are you?
A. I am, yes, sir.
Q. Is that the exhibit which contains the flat freight rate on shipments of potatoes from points of origin to points of destination in these cases?
A. Yes, sir. Exhibit C, which was offered in evidence by the plaintiff in the case, shows the freight rates on classes and com-

modities, including the rates on potatoes, from stations in
59 Minnesota and Wisconsin to stations in the state of Oklahoma.

Q. Does Exhibit C contain this five dollar rental charge for refrigerator cars, which has been referred to in this case?

A. It does not.

Q. Does it refer to any circular or tariff which does contain that five dollar rental charge?

Mr. Frost: Objected to as calling for an opinion of the witness and a conclusion, and that the exhibit speaks for itself.

The Court: I think the only way the witness should answer that question would be to point out any part of the exhibit that does contain such a thing, if it is there.

Mr. Elliott: It calls for a negative. It is not there.

Mr. Smith: He says he has examined it and knows what is in there, and I ask him if it is there.

The Court: I think he ought to be allowed to answer that, in view of the size of the exhibit.

A. It does not make any direct reference to any circular that contains the rental charge. I might qualify that statement by calling attention to item 1570 of Exhibit C on page 88, which reads as follows: "Shipments under this Tariff are entitled to such privileges and subject to such charges and other rules, as are covered by issuing or participating carriers' publications, which are lawfully on file with the Interstate Commerce Commission for Car Service, Custom House Brokerage, Demurrage, Drayage, Loading, Overloading or Shifting of Load, Reconsignment, Refrigeration, Storage, Switching, Terminal, Transfer and Unloading Charges, Equipment Allow-
60 ance, Rental for Palace Stock Cars and Transit Privileges."

The Court: That is the same clause as was read by the other witness, isn't it?

Witness: No, your Honor, it is not the same clause.

Q. Is there any other clause in this tariff, referring to rental for cars, besides the clause which you read referring to the rental of palace stock cars?

A. No, sir; neither this item nor any other item in the tariff refers to a rental charge for refrigerator or insulated cars

Q. Is that the tariff which governs on the shipment of potatoes from points in Minnesota and Wisconsin to points in Oklahoma?

A. This tariff governs to an extent in naming the rate on potatoes from Minnesota and Wisconsin to Oklahoma. The plaintiff in the case did not offer in evidence another tariff which should have been used with this tariff, namely, a tariff which is known as a territorial directory which is issued by Mr. F. A. Leland on behalf of all lines. That territorial directory should have been introduced in this case, if you wanted to get all the rates of transportation. This tariff names rates from some stations to Oklahoma, that is, from some Minnesota stations; but with the use of the other tariff you would have the entire rate situation.

Mr. Elliott: Does this exhibit cover the shipments involved in this particular law suit?

Witness: It does, I think, with the exception of Oklahoma city. I think Oklahoma city is one of the destinations named in
61 this case, is it not, Mr. Frost?

Mr. Frost: Yes.

Witness: This tariff, then, does not contain a rate on potatoes from the points of origin to Oklahoma city?

Q. Referring to Exhibit F, do you find it there?

A. I have it before me.

Q. That is Leland's Southwestern Lines' Tariff No. 1-I; I. C. C. No. 1052. Will you state what that tariff is, please?

A. This is a joint freight tariff issued by the Southwestern lines, Mr. F. A. Leland, Agent, at St. Louis, Missouri, and contains the rates on classes and commodities, including rates on potatoes, from Minnesota points and Wisconsin points to Texas.

Q. Does this tariff Exhibit F, contain this five dollar rental charge that we are discussing?

A. It does not.

Q. Does that tariff contain the same clauses that you read from Exhibit C?

A. This tariff does contain the same clause—if I can find it in here (looking in Exhibit F). I am satisfied that it is here; I have seen it before (after looking in Exhibit F). I don't find any clause that is similar to the one named in the other tariff there, although I think that clause was contained in some of these other Texas tariffs, that is, the tariff naming the rates.

Q. Does the tariff Exhibit F contain any direct reference to that five dollar charge?

A. No, sir, it does not.

Q. Does that tariff refer to any other tariff that contains
62 a direct reference to that five dollar charge?

A. No, sir.

Q. Does Exhibit C refer to any other tariff that contains a direct reference to that five dollar charge?

A. No, sir.

Mr. Frost: In regard to these answers as to direct references, and so forth—what the tariffs themselves show would be controlling with the Court, I take it.

Mr. Smith: That would undoubtedly be true; but this will help the Court a great deal in looking through these tariffs.

The Court: In view of the testimony of the witness that they are not in there, I will take that as proof that they are not, unless counsel on the opposite side points out a reference from which it might be inferred that they are in there.

Witness: I believe that would be the only idea in it—to save the Court running through a thousand and one provisions of the tariffs here.

Q. Have you made a careful examination of these tariffs for the purpose of discovering whether they contain a five dollar rental charge for refrigerator cars?

A. I have, yes, sir.

Q. And also to see whether they contain a direct reference to any other tariff which contains a five dollars rental charge?

A. Yes, sir.

Mr. Elliott: You are not speaking on general principles, but you have looked and ascertained for this purpose?

63 Witness: Yes, sir.

Q. Are you acquainted with one R. D. Williams?

A. I know one R. D. Williams, yes, sir.

Q. Who is he?

A. He is Assistant General Freight Agent of the Missouri, Kansas & Texas Railway Company, with headquarters at St. Louis, Missouri.

Mr. Elliott: That is the company that is plaintiff in this case?

Witness: Yes, sir.

Q. Did you see him January 11, 1916?

A. I did, yes, sir.

Q. Where?

A. At McAllister, Oklahoma.

Q. Did you hear him testify in the case of the Hale-Halsell Grocery Company, complainant, against the Missouri, Kansas & Texas Railway Company, before the Interstate Commerce Commission?

A. I did. The case was entitled Hale-Halsell Grocery Company v. M., K. & T. Railroad.

Mr. Frost: You heard him testify according to that transcript, did you?

Witness: I did, yes, sir.

Q. He was under oath, was he?

A. He was.

Q. At that hearing, while under oath, did R. D. Williams testify as follows, as a witness called for the railway company which is plaintiff in this case: "I desire to make the position of the Missouri, Kansas & Texas Railway Company in this case clear to the

64 Commission. The shipments involved in this complaint reached our line at Kansas City, Missouri, carrying a charge of five dollars in the advance column of the freight bill, showing car rental. We collected the charge in addition to the freight charges shown in the freight charge column of the waybill, on each of these shipments. Upon the collection of these charges, the consignees entered claims, I believe, for the refund of the charge, and we took up with our northern connections the question of making refund, and they held the charge had been properly applied in accordance with the tariffs. The charge was in their hands; that is, the money was turned over to our northern connections, and if we refunded it we were out the amount that we paid out, because they made one contention and we another originally. We finally, after a great deal of correspondence, concluded that we could not legally hold this charge under the tariffs in effect at the time of the movement of the business, and have instructed our agents to make refund of the five dollar rental charge on the shipments covered by this complaint"?

Mr. Elliott: We offer that as an admission made in open court.

Mr. Frost: That is objected to as not binding on the plaintiff here, and as being an opinion and conclusion of this assistant general freight agent.

The Court: Who was this man?

Witness: He was assistant general freight agent of the Missouri, Kansas & Texas Railway Company, the complainant in this case.

Mr. Elliott: Called as a witness by them in that case.

65 Witness: Yes.

The Court: Prior to the receivership?

Witness: Prior to the receivership, I think, although I am not positive about that.

The Court: It seems to me that it is incompetent, but I presume we may let it stand the same as the rest—subject to future ruling.

Mr. Elliott: Of course we don't offer it as binding or conclusive on anybody, but as an admission for whatever weight the Court may see fit to give to it.

Q. Is there anything else in regard to these tariffs, that you wish to explain to the Court?

Mr. Frost: I have no objection to the witness going ahead and making any statement, provided that I may ask to have any portion of it stricken out, if it should not be proper.

Witness: I don't think it is necessary to say anything further about the tariffs that have been offered in evidence here or as to the charge, except that as a rate man interpreting these tariffs I certainly interpret them as not authorizing this five dollar charge for rental of refrigerator or insulated cars.

Mr. Frost: I move that the last part, starting with "as a rate man" be stricken out as being an opinion and conclusion of the witness, and not competent evidence.

The Court: It does not appear to me that it should stand; but it may stand, subject to future ruling.

66 Q. Are you familiar with the shipping of potatoes from the northwest during the winter months?

A. Yes, sir.

Q. Do you know what the *proper* car to ship potatoes in during the winter months is?

A. Yes.

Q. What is the proper car to ship potatoes in during the winter months?

Mr. Frost: If the Court please, just let us have the formal objection that that is immaterial, and I will assume that the Court will take it over the objection.

The Court: I think it is immaterial; but he may answer.

A. Either the refrigerator or the insulated car.

By Mr. Frost:

Q. Will you state, very briefly, what we mean by the terms "shippers' protective service" and "carriers' protective service"?

A. "Shippers' protective service" means that the shipper undertakes under the terms of the freight tariffs to protect potatoes against freezing or overheating; and "carriers' protective service" means that the carrier for an additional charge undertakes to perform that service—in other words to protect the property against freezing or overheating.

Mr. Elliott: Was that what was referred to this morning by "Options 1 and 2"?

Witness: Yes. The shippers' protective service that is referred to in this case is commonly called option No. 1, and the carriers'
67 protective service is known as option No. 2.

SHERMAN W. CALLENDER sworn.

By Mr. Smith:

Q. What is your name?

A. Sherman W. Callender.

Q. What is your business?

A. The wholesale potato business.

Q. How long have you been in that business?

A. In the car lot potato business, for the last five years. In the handling of perishable products, for the last 25 years.

Q. Do you know the proper car in which to ship potatoes during the winter months, from the northwest?

A. Yes, sir.

Q. What is that car?

Mr. Frost: Same objection.

The Court: It will be taken subject to the objection.

A. The refrigerator or insulated car.

Q. Would you use any other car for shipments during the winter months, if you could obtain a refrigerator car?

A. No, sir.

MICHAEL C. RAGATZ sworn.

By Mr. Smith:

Q. What is your name?

A. Michael C. Ragatz.

Q. What is your business?

A. I am the secretary and traffic manager of the J. C. Famechon Company.

68 Q. What is the business of the J. C. Famechon Company?

A. Wholesale potatoes and produce.

Q. Are you familiar with the proper car to be used for the shipment of potatoes in the winter months, from the Northwest?

A. Yes, sir.
Q. What is the proper car in which to ship potatoes during the winter months from the northwestern territory?

Mr. Frost: Same objection.

Ruling reserved.

A. Insulated or refrigerator cars.
Q. Would you ever ship in any other car, if you could obtain a refrigerator car, during the winter months, from the northwest?
A. No, sir.

OLIVER W. TONG re-called.

By Mr. Smith:

Q. Referring again to options 1 and 2, does either one of those options provide for the character of car which should be used?
A. No, sir.
Q. Do the Great Northern and Northern Pacific publish individual tariffs?
A. Yes, sir.
Q. Are you familiar with them?
A. Yes, sir.
Q. Do the individual tariffs of either road contain this five dollar rental charge?
A. They do not.

Mr. Frost: Just a moment. That is objected to as an
69 opinion of the witness, not the best evidence, and im-aterial.
I don't know what counsel may have in their minds in referring to individual tariffs. As I understand tariffs, if the Northern Pacific concurs in this Southwestern Lines' tariff that was got up by the Southwestern lines, and if that tariff names a rate from a point on the Northern Pacific to some point in Oklahoma, that is just as binding on the Northern Pacific as if the Northern Pacific got out a tariff and it were referred to as an individual Northern Pacific tariff.
The Court: I don't see the materiality of it at all.

Q. Do the Great Northern and Northern Pacific roads, in addition to this joint tariff which has been referred to, issue individual tariffs and exceptions?
A. Yes, sir.
Q. Where are they applicable?
A. They are applicable at local stations on those lines of railroad.

Defendant rests.
Testimony closed.
(Case to be submitted on briefs.)

(Title of Cause.)

Stipulation.

It is stipulated that Southwestern Lines' Exceptions and Rules Circular No. 3-I (Exhibit H), and Southwestern Lines' Exceptions and Rules Circular No. 3-J (Exhibit B), were reissues of Southwestern Lines' Exceptions and Rules Circular No. 3-H.

70

D. R. FROST,
Attorney for Plaintiff.
G. H. SMITH,
Attorney for Defendant.

(Endorsed:) Filed Mar. 18, 1919. Harry Moore, clerk, by C. A. Eck, deputy.

PLAINTIFF'S EXHIBIT A.

Stipulation.

It is hereby stipulated between the parties to the above entitled action that for the purposes of the trial the statements herein contained are facts:

I.

The defendant made the carload shipments of potatoes mentioned in the causes of action of the complaint from the points of origin therein mentioned, to the destinations mentioned and also made the shipments of potatoes described in the counterclaim set forth in the defendant's answer from the points of origin mentioned in the said counter-claim to the destinations therein mentioned.

II.

The plaintiff will secure and have at the trial either the original bills of lading of all of the said shipments, or the station carbon copies thereof, and if the plaintiff should not have either the original or the station carbon copies the defendant has the privilege of putting in evidence its memorandum carbon copies of the said bills of lading for any purpose other than that stipulated under paragraph I hereof.

71

III.

The cars furnished by the initial carrier and loaded, were refrigerator or other insulated cars, and an order for refrigerator or other insulated cars for each shipment had been duly filed with the carrier at the points of origin.

IV.

The initial carriers, at the time of the shipments involved in this action, refused to accept carload potato shipments for movement under Carriers' Protective Service, unless refrigerator or other insulated cars were used for loading.

V.

Upon the arrival of each of the four shipments mentioned in the first cause of action of the complaint at the respective destinations, the transportation charges were collected by and paid to the M. K. & T. Railway Company, upon the following basis, to wit: Charges figured upon the regular established freight rate per hundredweight for potato shipments in carload lots, and in addition thereto, there was collected and paid in each instance, rental charge of $5.00 per car.

Afterwards defendant made claims upon the M. K. & T. Railway Company, on each of the four cars for a refund of the said charge of $5 for car rental, alleging as a cause for the refund that the freight tariffs of the M. K. & T. Railway Company and of its connecting carriers who participated in moving the shipments, did not lawfully provide for the said charge, and thereafter payments were made to the defendant of $5 each by the M. K. & T. Railway Company as follows:

72 On cars 96837, 51664, January 18, 1916.
On cars 50310, 37393, February 1, 1916.

Upon arrival of car No. P 96574, shipped from Rush City, Minnesota, to Muskogee, Oklahoma, the M. K. & T. Railway Company collected from the defendant, or defendant's agent, the freight charges based upon the regularly established freight rate per hundred weight on carload shipments of potatoes from Rush City to Muskogee, but there was not collected any charge for car rental of the refrigerator or insulated car, and no such charge was shown on the freight receipt issued at Muskogee by the M. K. & T. Railway Company.

VI.

Upon arrival of the carload potato shipments mentioned in the counter-claim of the defendant's answer, the M. K. & T. Railway Company collected a car rental charge of $5 in addition to the freight charges figured upon the regularly established freight rate per hundredweight for potato shipments in carload lots.

VII.

The tariffs and circulars hereinafter referred to, prior to the dates of the shipments mentioned in the causes of action in the complaint and answer, had been printed and duly filed with the Interstate Commerce Commission.

VIII.

The Western Trunk Line Circular No. 12, and supplements thereto, was on file during the time of the shipments involved in this action in the stations of the initial carrier from which such shipments were made, and at the stations to which deliveries were
73 made, except that same was not on file at the station at Sulphur Springs, Texas. The question whether the same was on file at the stations mentioned in the counter-claim is not determined by this stipulation, but is left open for consideration.

IX.

That Western Trunk Line Circular No. 12, and supplements thereto, was the only tariff issued by any of the carriers participating in the transportation of the shipments involved in this action which contained the $5 rental charge for the use of refrigerator or other insulated cars.

X.

That the tariffs and supplements thereto containing the freight rates per hundred pounds on carload shipments of potatoes between the points of origin mentioned in the complaint and in the counter-claim contained in the answer, and the respective destinations therein mentioned, were, on the dates of the said shipments, kept on file at the stations of origin of all the shipments and at the respective stations of destinations.

XI.

That Southwestern Lines' Exceptions and Rules Circulars and supplements thereto, was on file at the stations of destination mentioned in the causes of action of the complaint, but was not kept and was not on file at the stations of origin of the said shipments.

XII.

That either party may offer in evidence any tariff or tariff circular in addition to the Western Trunk Line Circular No. 12, and
74 supplements thereto, filed with the Interstate Commerce Commission, by any of the carriers who participated in the carriage of the shipments in question, without the same being certified by the Interstate Commerce Commission and the same may be received in evidence, provided that Circular No. 12, or any other tariff or circular, is not incompetent or immaterial on other grounds. The right is reserved by both parties to object to any tariff or circular on any grounds of competency or materiality other than want of certification or printing or filing with the Interstate Commerce Commission, or proof of the said tariffs or circulars being kept or not kept on file at the particular railway stations as already stipulated herein.

XIII.

Prior to the starting of this action, the M. K. & T. Railway Company, according to the traffic and accounting arrangements existing between it and the initial carriers of the shipments involved in the complaint and the counter-claim of the answer, had duly paid all of the $5 car rental charges herein involved, to the respective initial carriers under the said traffic and accounting arrangements.

——— ———,
Attorney for Plaintiff.
——— ———,
———— ———,
Attorneys for Defendant.

Copy from Front Cover of Plaintiff's Exhibit B.

I. C. C. No. 1065.

75 F. A. Leland, Agent.

Southwestern Lines' Classification Exceptions and Rules Circular No. 3-J.

Cancels Southwestern Lines' Classification Exceptions and Rules Circular No. 3-I.

Exceptions to Western Classification No. 52 (I. C. C. No. 10), or reissues thereof and rules and conditions Applicable on Traffic to and from Points In Oklahoma (Except as otherwise provided in item No. 12 or reissues thereof).

In connection with tariffs made subject thereto.

Issued October 24, 1914.

Effective November 30, 1914.

Copy of Item No. 69, from Page 32 of Exhibit B.

"Shipments transported under the Rates, Rules and Regulations prescribed in this Classification, and in Tariffs made subject to this Classification, shall be subject to such further charges and allowances *are* are contained in publications of the participating carriers lawfully on file with the Interstate Commerce Commission relating to:

Bedding of Live Stock,
Brokerage,
Bulkheading of Cars,
Capacity of Cars,
Caretakers,
Car Crating,
Car Lining,
Car Rental,
Car Service,
Cartage,

Changing Destination,
76 Concentration,
Customs Duties,
Demurrage,
Dimension of Cars,
Dipping,
Diversion,
Drayage,
Dunnage,
Elevation,
Equipment Allowance,
Estimated Weights,
Feed,
Feeding in Transit,
Freight Transported by Passenger Train,
Furnishing Cars of Greater or Less Capacity than ordered by shipper,
Hay for Packing,
Icing Refrigerator Cars,
Lighterage,
Loading,
Marine Insurance,
Market Privileges,
Minimum Charge,
Minimum Weight,
Overloading or Shifting of Load,
Premium Packages,
Preservatives,
Racking and Stripping of Refrigerator Cars Containing Dairy Products,
Reconsignment,
Refrigeration,
Remnant Shipments,
Rental Charges,
77 Shrinkage,
Stop-over Privileges,
Storage,
Stoves in Cars,
Straw used for Packing,
Switching,
Temporary Partitions,
Terminal Charges,
Trackage,
Transfer,
Transit Privileges,
Transportation of Freight in Defective Cars,
Transportation of Freight in Newly Built Cars,
Transportation of Freight in Re-built Cars,
Unloading,
Use of two cars when one has been ordered,
Ventilation,
Watering of Live Stock,

Wharfage, except that where specific rules covering such charges, privileges or allowances are provided in this Classification or in the Tariffs made subject to this Classification, those contained in such individual publications will not apply.

Car service charges and terminal rules and regulations on traffic at points in Canada, are covered by J. E. Duval's I. C. C. No. 2, or reissues thereof, which has lawfully been filed with the Interstate Commerce Commission.

For capacities and dimensions of cars, see Official Railway Equipment Register, I. C. C.—R. E. R.—No. 26 or reissues thereof (issued by G. P. Conrad, Agent)."

78 *Copy from Front Page of Plaintiff's Exhibit C.*

I. C. C. No. 969.

F. A. Leland, Agent.

Southwestern Lines' Tariff No. 15-G.

Local, Joint and Proportional Tariff applying on Classes and Commodities between Minneapolis-St. Paul Territory and Stations in Oklahoma.

Governed, except as otherwise provided herein, by Western Classification No. 50, or reissues thereof; and by Southwestern Lines' Classification Exceptions and Rules Circular No. 3-H (F. A. Leland's I. C. C. No. 962), or reissues thereof.

Issued January 8th, 1913.

Effective January 20th, 1913.

Copy from Page 88, Plaintiff's Exhibit C.

Item No. 1370.

(*a*) Shipments under this tariff are entitled to such privileges, and subject to such charges and other rules, as are covered by issuing or participating carriers' publications, which are lawfully on file with the Interstate Commerce Commission for Car Service, Custom House Brokerage, Demurrage, Drayage, Loading, Overloading or Shifting of Load, Reconsignment, Refrigeration, Storage, Switching, Terminal, Transfer and Unloading Charges, Equipment Allowance, Rental for Palace Stock Cars, and Transit Privileges.

(*b*) Car Service Rules at points in Canada are covered by "The Canadian Car Service Rules" (J. E. Duval's I. C. C. No. 1), or reissues.

(*c*) Other terminal rules and regulations on traffic at points in Canada are covered by the following publications, or reissues,
79–86 which have lawfully been filed with the Interstate Commerce Commission:

Canadian Pacific Ry.....I. C. C. No. E-380
Grand Trunk Ry.....I. C. C. No. 1162
Intercolonial Ry.....I. C. C. No. 341
Michigan Central R. R.....I. C. C. No. 3578
New York & Ottawa Ry.....I. C. C. No. 597
New York Central & Hudson River R. R.....I. C. C. No. X-2
Ottawa & New York Ry.....I. C. C. No. 567
Wabash R. R.....I. C. C. No. 1155

* * * * * * *

87 *Copy from Front Cover Plaintiff's Exhibit H.*

Supplement No. 13 to Southwestern Lines' Classification Exceptions and Rules, Circular No. 3-I.

Issued July 20, 1914.

Effective August 27, 1914.

Copy from Plaintiff's Exhibit H, Page 4, Item 108-B.

Shipments transported under the Rates, Rules and Regulations prescribed in this Tariff, and in Tariffs made subject to this Tariff, shall be subject to such further charges and allowances as are prescribed in publications of the participating carriers lawfully on file with the Interstate Commerce Commission relating to:

88 Bedding of Live Stock.
Brokerage.
Bulkheading of Cars.
Capacity of Cars.
Caretakers.
Car Crating.
Car Lining.
Car Rental.
Car Service.
Cartage.
Changing Destination.
Concentration.
Customs Duties.
Demurrage.
Dimensions of Cars.
Dipping.
Diversion.
Drayage.
Dunnage.
Elevation.
Equipment Allowance.
Estimated Weights.
Feed.
Feeding in Transit.
Freight transported by Passenger Train.

Furnishing Cars of Greater or Less Capacity than ordered by shipper,
Hay for Packing,
Icing Refrigerator Cars,
Li-*the*rage,
Loading,
Marine Insurance,
Market Privileges,
Minimum Charge,
Minimum Weight,
Overloading or Shifting of Load,
Premium Packages,
Preservatives,
Racking and Stripping of Refrigerator Cars Containing Dairy Products,
Reconsignment,
Refrigeration,
Remnant Shipments,
Rental Charges,
Shrinkage,
Stop-over Privileges,
Storage,
Stoves in Cars,
Straw used for Packing,
Switching,
Temporary Partitions,
Terminal Charges,
Trackage,
Transfer,
Transit Privileges,
Transportation of Freight in Defective Cars,
Transportation of Freight in Newly Built Cars,
Transportation of Freight in Re-built Cars,
Unloading,
Use of two cars when one has been ordered,
Ventilation,
Watering of Live Stock,
Wharfage, except that where specific rules covering such charges, privileges or allowances are provided in this Tariff or in the Tariffs made subject to this Tariff, those contained in such individual publication will not apply.

Car service charges and terminal rules and regulations on traffic at points in Canada are covered by J. E. Duval's I. C. C. No. 2, or reissues thereof, which has lawfully been filed with the Interstate Commerce Commission.

Copy from Front Page of Plaintiff's Exhibit I.

I. C. C. No. A-489.

Circular No. 12 of Western Trunk Lines, Great Northern Railway, G. F. O. No. 24737, Missouri, Kansas & Texas Railway, Circular No. 862, Northern Pacific Railway.

Rules and Regulations Regarding Refrigeration, Icing, and Handling of Perishable Freight.

Issued November 19, 1913.

Effective January 1, 1914.

Copy from Plaintiff's Exhibit I, Page 14.

Rules, Nos. 220.

Rules Governing the Transportation of Potatoes and Vegetables (See Exception).

The rates named in tariffs making reference hereto or to W. H. Hosmer's I. C. C. No. A-396, or to publications superseded
91 thereby or to succeeding issues thereof, on Potatoes in straight carloads or in mixed carloads with vegetables rated class "C" in Western Classification, cover transportation charges only and do not include any additional service, such as protection of the property from frost.

In order that shipments may be protected from loss on account of frost, shippers shall either provide such protection or request the carriers to do so.

Rule No. 1—Cars Heated by Shipper.

In case the shipper elects to provide the protection, the following rules (subject to Rule No. 3) will apply:

During the period November 1st to the following March 31st, both inclusive (also October 1st to October 31st and April 1st to April 30th, inclusive, when weather conditions require), temporary lining or false flooring or both, also stoves, fittings and fuel for same, sufficient to properly protect the shipment, must be furnished and installed by shipper and at his expense.

Fuel for stoves must consist of coal, coke or charcoal. Stoves must be of suitable design as to safety approved by initial carrier and must be securely fastened and braced. When coal or coke is used, stove pipes must be run through a board, protected with a metal collar, securely fastened at one side of the doorway of the car, and secured clear of all woodwork, and fitted with an elbow and pipe projecting above the car not more than 24 inches.

Woodwork, where exposed to heat, must be protected by sheet metal. Shippers must provide men to care for fires (See
92 Rule 190 for provisions covering transportation of attendants).

When stoves, fittings and fuel therefor, also flooring and lining, are used as provided in foregoing rules, an allowance will be made for the actual weight of same, but not to exceed 1,000 pounds when loaded in insulated cars, and 2,500 pounds when loaded in other than insulated cars, but in no event will charges be assessed upon less than the carload minimum weight provided in tariff applicable. Any weight in excess of the allowances provided above will be charged for at the carload rate applying on the contents of the car.

Stoves or Heaters, Linings, False Bottoms, Racks and Mechanical Braces used in accordance with the foregoing rules, will be returned free, as provided for in Rule No. 200.

Rule No. 2—Cars Heated by Carrier.

In case the carriers furnish the protective service hereinafter provided, the following rules and charges therefor will apply.

During the period October 1st to the following April 30th, both inclusive, the carriers will furnish heated car service and will assess the following charges therefor:

Heating Charge.

Group 1.

Locally in

North Dakota, Iowa, Illinois, South Dakota.	4 cents per cwt., subject to tariff minimum weight provided in tariffs applicable.

93 Group 2.

Between

Minnesota and Iowa points. Minnesota and North Dakota points. Minnesota and South Dakota points. Minnesota and Wisconsin points. Wisconsin and Illinois. Wisconsin and Iowa. North Dakota and South Dakota. South Dakota and Nebraska. South Dakota and Iowa.	5 cents per cwt., subject to tariff minimum weight provided in tariff applicable.

Group 3.

Between	
Minnesota and Missouri, Minnesota and Illinois, Minnesota and Nebraska, Wisconsin and Missouri, Wisconsin and North Dakota, Wisconsin and South Dakota, Wisconsin and Nebraska, North Dakota and Iowa, South Dakota and Illinois,	6 cents per cwt., subject to tariff minimum weight provided in tariff applicable.

Group 4.

Between	
North Dakota and Missouri, North Dakota and Illinois, North Dakota and Nebraska,	7 cents per cwt., subject to tariff minimum weight provided in tariff applicable.

B. Reconsigning Charge.

When heater cars under heat are reconsigned to another destination after arrival at original destination, a reconsignment charge of $4 per car plus $1 per car per day or fraction thereof for heater service during the entire period car is held for reconsignment (Sundays and legal holidays included) will be made in addition to regular heater transit rate in effect from original shipping point to final destination. Reconsignment to be permitted only to destinations to which shipment may be forwarded under this circular.

94

C. Heater Storage Charge.

During the period from November 1st, to April 15th, inclusive, or such other time of the year as heater cars are used with fires lighted, the heater storage charge of $2 per day or fraction thereof will be assessed at shipping points, at stop-off points, or when held in transit by order of shipper or at destination beyond the prescribed free car demurrage period. The heater-storage charge will apply in addition to the heater transit, reconsignment or demurrage charges provided for *the in* tariff.

Rule. No. 3—Rental on Insulated Cars.

When shipper orders a refrigerator or other insulated car to be heated by him or to move without heat, a charge of $5.00 per car

per trip will be made for use of car and will accrue to the owner thereof.

Exception.

Above Rules will not Apply on Minnesota or Wisconsin Intrastate Traffic.

(Cir. 6459.)

(Title of Action.)

"Stipulation.

It is stipulated between the parties hereto, that at the time of the shipments specified in the complaint and the counterclaim of defendant, that portion of Interstate Commerce Commission's Tariff Circular No. 18-A, attached hereto and marked Exhibit
95 No. 1, was in force and effect. Also that the Interstate Commerce Commission adopted, effective June 2, 1908, the regulations contained in Defendant's Exhibit No. 2, attached hereto. Also that the Interstate Commerce Commission adopted, effective October 12, 1915, the regulations contained in Defendant's Exhibit No. 3, attached hereto, in lieu of the regulations of June 2, 1908, contained in Exhibit No. 2. That the Missouri, Kansas and Texas Railway Company and the carriers on whose lines the shipments referred to in the complaint originated had complied with the regulations of Exhibit No. 2, by placing in the hands and custody of agents at the respective points of origin of the shipments mentioned in the complaint copies of the rate tariffs No. 15-G and No. 1-I, also of Western Trunk Line Circular No. 12, and supplements, but there were not on file or in the custody of agents at the respective points of origin copies of Southwestern Life's Exceptions and Rules Circulars and supplements thereto. At the stations of destination of shipments referred to in the complaint, copies of the rate tariffs No. 15-G and No. 1-I and of Southwestern Lines' Exceptions and Rules Circulars and supplements were duly kept and Western Trunk Line Circular No. 12 and supplements were duly kept at all said stations of destination except that this Circular No. 12 and supplements were not kept at Sulphur Springs, Texas.

The Missouri, Kansas and Texas Railway Company and the lines on which the shipments referred to in defendant's counter-claim originated, had complied with the regulations contained in
96 Exhibit No. 3, by placing in the hands and custody of agents at the respective points of origin and of destination copies of the schedules or tariffs that contained the freight rates, and at the stations of origin of those shipments said agents duly kept Western Trunk Line Circular No. 12 and supplements, but this Circular No. 12 and supplements were not kept at the stations of destination of the shipments mentioned in the counter-claim. At the stations of origin copies of the Southwestern Lines' Exceptions and Rules Circulars and supplements were not kept but copies of these Exceptions and Rules

circulars and supplements were kept at the stations of destination of the shipments referred to in defendant's counter-claim.

It is also stipulated that at the time of the shipments mentioned in the complaint and in the defendant's counter-claim, the Missouri, Kansas and Texas Railway Company and the carriers on whose lines said shipments originated had complied with the requirements of Exhibits No. 2 and No. 3, attached hereto in respect to keeping complete files of tariffs at designated offices in such cities named in Exhibits No. 2 and No. 3, as were on the railway lines of the Missouri, Kansas and Texas Company and of the originating carriers.

(Signed) G. H. SMITH,
CHARLES B. ELLIOTT,
Attorneys for Defendant.

N. Y. Life Bldg., Minneapolis.

D. R. FROST,
Attorney for Plaintiff.

1018 Northern Pacific Ry. Co., Saint Paul, Minnesota.

97 EXHIBIT 1.

Tariff Circular No. 18-A entitled Regulations to Govern the Construction and Filing of Freight Tariffs and Classifications and Passenger Fare Schedules contains the following rule:

3. The title-page of every tariff shall show:

(*a*) .....
(*b*) .....
(*c*) .....
(*d*) .....
(*e*) "Reference by name and I. C. C. number to the classification and exception sheets governing the tariff. Following form will be used: 'Governed, except as otherwise provided herein, by the .. classification .., I. C. C. No. ..., supplements thereto and reissues thereof and by exceptions to said classification .., I. C. C. No. .., supplements thereto and reissues thereof.' A tariff is not governed by a classification or exceptions thereto except when and to the extent stated on the tariff."

EXHIBIT 2.

Interstate Commerce Commission.

At a general session of the Interstate Commerce Commission, held at its office, in Washington, D. C., on the 2nd day of June, A. D. 1908.

Present:

98 Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Frank K. Lane, Edgar E. Clark, James S. Harlan, Commissioners.

In the Matter of Modification of the Provisions of Section Six of the Act with Regard to Posting Tariffs at Stations.

Under the authority conferred upon the Commission by section 6 of the act, to modify its requirements as to publishing, posting and filing of tariffs, the Commission issues the following order, in connection with which it must be understood that each carrier has the option of availing itself of this modification of the requirements of section 6 of the act or of complying literally with the terms of the act. If such modification is accepted by a carrier it must be understood that misuse of the privileges therein extended or frequent misquotation of rates on the part of its agents will result in cancellation of the privileges as to that carrier. It should also be understood that in so modifying the requirements of the act the Commission expects a continuation by carriers of the practice of furnishing tariffs to a reasonable extent to frequent shippers thereunder:

Every carrier subject to the provisions of the act to regulate commerce (excepting those to which special and specific modifications have heretofore been granted) shall place in the hands and custody of its agent or other representative at every station, warehouse, or office at which passengers or freight are received for transportation, and at which a station agent or a freight agent or a ticket agent is employed, all of the rate and fare schedules which contain
99 rates and fares applying from that station, or terminal or other charges applicable at that station, including the schedules issued by that carrier or by its authorized agent and those in which it has concurred. Such agent or representative shall also be provided with all changes in, cancellations of, additions to, and reissues of such publications in ample time to thus give to the public, in every case, the thirty days' notice required by the act.

Such agent or representative shall be provided with facilities for keeping such file of schedules in ready-reference order, and be required to keep said files in complete and readily accessible form. He shall also be instructed and required to give any information contained in such schedules, to lend assistance to seekers for information therefrom, and to accord inquirers opportunity to examine any of said schedules, without requiring or requesting the inquirer to assign any reason for such desire, and with all the promptness possible and consistent with proper performance of the other duties devolving upon him. He shall also furnish upon request therefor quotation in writing of rates via such carrier's line not contained in the tariffs on file at that station. Carrier may arrange for such agent to refer such requests to a proper officer of the company, but the quotation must be furnished within a reasonable time and without unnecessary delay.

Each of such carriers shall also provide and each of such agents or representatives shall also keep on file copies of the current I. C. C. issues of the indices of the tariffs of that carrier.

Each of such carriers shall also provide, either in its in-
100 dices of tariffs (provided for in Rules 11 and 39 of Commission's tariff regulations, Tariff Circular 15-A), or in separate

publication or publications, which must be kept up to date, be given I. C. C. numbers and be filed with the Commission, an index or indices of the tariffs that are to be found in the files at each of its several stations or offices. Such index shall be kept on file and be open to inspection at each of such several stations or offices as hereinbefore provided. If such indices are prepared for a system of road or for a number of stations or offices they must be printed and may be arranged under a system of station numbers and alphabetical list of stations. If arranged for individual stations or offices they may be printed or typewritten. All such indices must be of size 8 by 11 inches.

Each of such carriers shall require its traveling auditors to check up each station's or office's file of tariffs at least once in each six months, unless it employs one or more traveling tariff inspectors who will make such inspections and checks.

Each of such carriers whose lines reach any of the cities in the following list, either over its own rails or by trackage rights, or by boat line, or by ferry, shall provide and maintain at each of said cities so reached by it, and at such additional points as may from time to time be designated by the Commission, complete files of the tariff publications which it issues or is a party to, together with indices of same as hereinbefore required:

Alabama, Montgomery.
Arkansas, Little Rock.
101 California, San Francisco, Los Angeles.
Colorado, Denver.
Connecticut, Hartford.
Florida, Jacksonville.
Georgia, Atlanta.
Illinois, Chicago, Springfield.
Indiana, Indianapolis.
Iowa, Des Moines.
Louisiana, New Orleans.
Maine, Portland.
Maryland, Baltimore.
Massachusetts, Boston, Worcester.
Michigan, Detroit.
Minnesota, St. Paul, Minneapolis.
Mississippi, Jackson.
Missouri, St. Louis, Kansas City.
Montana, Helena.
Nebraska, Omaha.
New York, New York, Buffalo.
North Carolina, Charlotte.
Ohio, Cincinnati, Cleveland.
Oklahoma, Oklahoma City.
Oregon, Portland.
Pennsylvania, Philadelphia, Pittsburg.
South Carolina, Columbia.
South Dakota, Sioux Falls.
Tennessee, Memphis, Chattanooga.

Texas, Fort Worth, Houston.
Utah, Salt Lake City.
Virginia, Richmond.
Washington, Seattle.
Wisconsin, Milwaukee.

Each of such files shall be in charge of an employee who
102 will give information and assistance to those who may wish to consult such file, and each such file shall be kept open and accessible to the public during ordinary business hours and on business days.

Each of such carriers whose lines do not so reach any of the above named cities shall also provide at least one point on its line a complete file of the tariffs which it issues or is a party to, together with indices of same as hereinbefore required, which file will be in charge of an employee of the carrier, who will give desired information and assistance to those who may wish to consult such file. This file of tariffs shall be open and accessible to the public during ordinary business hours and on business days.

Each of such carriers shall also provide and cause to be posted and kept posted in two conspicuous places in every station waiting room, warehouse, or office at which schedules are so placed in custody of agent or other representative notices printed in large type and reading as follows:

(A) Complete public file (or files) of this company's tariffs is (are) located at —— in the city of —— (or the cities of —— and ——). The rate and fare schedules applying from or at this station and indices of this company's tariffs are on file in this office, and may be inspected by any person upon application and without the assignment of any reason for such desire.

The agent or other employee on duty in the office will lend any
103 assistance desired in securing information from or in interpreting such schedules.

At exclusive freight stations or warehouses and at exclusive passenger stations or offices carriers may, under this order, place and keep on file only the freight or passenger schedules, respectively, and in such cases the posted notice may be varied to read:

The freight rate (or passenger fare) schedules applying from or at (or from) this station and index of this company's freight (or passenger) tariffs are on file in this office, etc.

Each of such carriers shall also require its agent or other employee in charge of tariffs at each point where complete public file is not kept to post from time to time in a public place in waiting room or office a brief bulletin notice to the effect that rates from that section on certain commodities have been changed.

Compliance with this order as to all available tariffs is required not later than October 1, 1908, and full compliance in every instance not later than January 1, 1909.

A true copy.

EDW. A. MOSELEY,
Secretary.

A true copy.

[Seal of Interstate Commerce Commission, 1887.]

GEORGE B. McGINTY,
Secretary.

104 EXHIBIT 3.

Interstate Commerce Commission.

At a General Session of the Interstate Commerce Commission, held at its office, in Washington, D. C., on the 12th day of October A. D. 1915.

In the Matter of Modification of the Provisions of Section Six of the Act with Regard to Posting Freight or Passenger Tariffs at Stations.

Under the authority conferred upon the Commission by section 6 of the act, to modify its requirements as to publishing, posting and filing of tariffs, the Commission issues the following order in connection with which it must be understood that each carrier has the option of availing itself of this modification of the requirements of section 6 of the act or of complying literally with the terms of the act. If such modification is accepted by a carrier it must be understood that misuse of the privileges therein extended will result in cancellation of the privileges as to that carrier. It should also be understood that in so modifying the requirements of the act the Commission expects a continuation by carriers of the practice of furnishing tariffs to the public, without unjust discrimination.

Every carrier subject to the provisions of the act to regulate commerce which files freight or passenger tariffs shall place in the hands and custody of its agent or other representatives at every station, warehouse, or office at which passengers or freight
105 are received for transportation, and at which a station agent or a freight agent or a ticket agent is employed, all of the rate and fare schedules which contain rates and fares applying from that station, or terminal or other charges applicable at that station, including the schedules issued by that carrier or by its authorized agent and those in which it has concurred, excepting only publications showing the marked capacities, lengths, dimensions, and cubical capacities of cars, as required by the Commission's order of January 9, 1912. Such agent or representative shall also be provided with all changes in, cancellations of, additions to, and reissues of such publications in ample time to thus give to the public, in every case, the 30 days' notice required by the act or such other notice as may be authorized by the Commission in special cases.

Each of such carriers shall require its agent or other representative at every station, warehouse, or office at which tariffs are required to be posted upon receipt of a tariff or supplement to a tariff for filing and posting at that station to immediately write or stamp upon the title-page of such publication the date upon which it was received by such agent or other representative and to keep and pre

serve a separate record, by I. C. C. numbers and supplement numbers, of the receipt of each tariff or supplement to a tariff showing the date received and the date posted.

Such agent or representative shall be provided with facilities for keeping such file of schedules in ready reference order and be required to keep said files in complete and readily accessible
106 form. He shall also be instructed and required to give any information contained in such schedules, to lend assistance to seekers for information therefrom, and to accord inquirers opportunity to examine any of said schedules without requiring or requesting the inquirer to assign any reason for such desire and with all the promptness possible and consistent with proper performance of the other duties devolving upon him.

Each of such carriers shall also provide and each of such agents or representatives shall also keep on file copies of the current I. C. C. issues of the indices of the tariffs of that carrier.

Each of such carriers shall also provide, either in its indices of tariffs (provided for in Rules 11 and 39 of Commission's tariff regulations, Tariff Circular 18-A or reissues thereof) or in separate publications, which must be kept up to date, be given I. C. C. numbers, and be filed with the Commission, a list of the tariffs that are to be found in the files at each of its several stations or offices. If this information is included in the index of tariffs required by Tariff Circular 18-A, such index must also contain an alphabetical list of the stations. Such publication shall be kept on file and be open to inspection at each of such several stations or offices as hereinbefore provided. They must be of size 8 by 11 inches, be printed, and be arranged under a system of station numbers and alphabetical list of stations.

Each of such carriers shall require its traveling auditors to check up each station's or office's file of tariffs at least once in each
107 six months unless it employs one or more traveling tariff inspectors who make such inspections and checks.

Each of such carriers whose lines reach any of the cities in the following list, either over its own rails or by trackage rights or by boat line or by ferry, shall provide and maintain at each of said cities so reached by it and at such additional points as may from time to time be designated by the Commission complete files of all the freight-tariff publications which it issues or is a party to and all of the passenger-fare tariffs as to which it is an initial carrier and each of its excursion-fare tariffs which covers a period exceeding 30 days, together with the indices of same, as hereinbefore required:

Alabama, Mountgomery.
Arkansas, Little Rock.
California, San Francisco, Los Angeles.
Colorado, Denver.
Connecticut, Hartford.
Florida, Jacksonville.
Georgia, Atlanta.
Illinois, Chicago, Springfield.

Indiana, Indianapolis.
Iowa, Des Moines.
Kansas, Wichita.
Louisiana, New Orleans.
Maine, Portland.
Maryland, Baltimore.
Massachusetts, Boston, Worcester.
Michigan, Detroit.
Minnesota, St. Paul, Minneopolis.
Mississippi, Jackson.
Missouri, St. Louis, Kansas City.
108 Montana, Helena.
Nebraska, Omaha.
New York, New York, Buffalo.
North Carolina, Charlotte.
Ohio, Cincinnati, Cleveland.
Oklahoma, Oklahoma City.
Oregon, Portland.
Pennsylvania, Philadelphia, Pittsburgh.
South Carolina, Columbia.
South Dakota, Sioux Falls.
Tennessee, Memphis, Chattanooga.
Texas, Forth Worth, Houston.
Utah, Salt Lake City.
Virginia, Richmond.
Washington, Seattle.
Wisconsin, Milwaukee.

except that the Atchison, Topeka & Santa Fe Railway Company be permitted to establish and maintain a public file of tariffs at Topeka, Kans., instead of Wichita, Kans.; that the Texas & Pacific Railway Company be permitted to establish and maintain a public file of tariffs at Dallas, Tex., instead of Fort Worth, Tex.; and that the Gulf, Colorado & Santa Fe Railway Company be permitted to establish and maintain a public file of tariffs at Galveston, Tex., instead of Houston, Tex.

Each of such files shall be in charge of an employee of the carrier who will give information and assistance to those who may wish to consult such file, and each such file shall be kept open and accessible to the public during ordinary business hours and on business days.

Each of such carriers whose lines do not so reach any of
109 the above named cities shall also provide at least one point on its line a complete file of the tariffs which it issues or is a party to, together with indices of same as hereinbefore required:

Provided, That the South Manchester Railroad Company be authorized to establish and maintain a complete public file of tariffs at Hartford, Conn.; the Wood River Branch Railroad Company be authorized to establish and maintain a complete public file of tariffs at Boston, Mass.; and the Pittsburgh, Chartiers & Youghiogheny Railway Company be authorized to establish and maintain a complete public file of tariffs at Pittsburgh, Pa., instead of at any point on the lines of these carriers; Provided further, That, if a subsidiary

or small connecting line has authorized the parent company, or principal connecting line, to publish and file for it all of its tariffs, tariffs so issued and filed on its behalf will be included in the complete public tariff files of the parent or issuing line, and it will not be necessary for such subsidiary or small line to maintain an additional complete public file.

Each of such files shall be in charge of an employee of the carrier, who will give desired information and assistance to those who may wish to consult such file, and each such file shall be kept open and accessible to the public during ordinary business hours and on business days.

Each of such carriers shall also provide and cause to be posted and kept posted in two conspicuous places in every station waiting room, warehouse, or office at which schedules are so placed in custody of agent or other representatives notices printed in large type
110 and reading as follows:

(A) Complete public file (or files) of this company's tariffs is (are) located at ——, in the city of —— (or the cities of —— and ——). The rate and fare schedules applying from or at this station and indices of this company's tariffs are on file in this office, and may be inspected by any person upon application and without the assignment of any reason for such desire.

The agent or other employee on duty in the office will lend any assistance desired in securing information from or in interpreting such schedules. At exclusive freight stations or warehouses and at exclusive passenger stations or offices carriers may, under this order, place and keep on file only the freight or passenger schedules, respectively, and in such cases the posted notices may be varied to read:

The freight rate (or passenger fare) schedules applying from or at (or from) this station and index of this company's freight (or passenger) tariffs are on file in this office, etc.

This order is effective December 1, 1915, and cancels order of June 2, 1908, and orders subsequently entered modifying, amending, or supplementing same.

By the Commission.

GEORGE B. McGINTY,
Secretary.

[SEAL.]

A true copy.

[Seal "Interstate Commerce Commission, 1887."]

GEORGE B. McGINTY,
Secretary.

Washington: Government Printing Office: 1915.

111 (Endorsed:) "Filed Mar. 17, 1919. Harry Moore, clerk, by O. J. Hanson, deputy."

STATE OF MINNESOTA,
County of Hennepin:

Municipal Court, City of Minneapolis.

C. E. SCHAFF, as Receiver of the Missouri, Kansas & Texas Railway Company, a Corporation, Plaintiff,

vs.

J. C. FAMECHON COMPANY, a Corporation, Defendant.

Notice.

To the above-named defendant and to Messrs. Charles B. Elliott and George H. Smith, attorneys for said defendant:

Take notice that the plaintiff proposes the foregoing transcript as a settled case in the above action, and you are notified within the time fixed by law to propose such amendments or changes thereto as you may deem proper.

D. R. FROST,
Attorney for Plaintiff.

1018 Northern Pacific Ry. Bldg.,
Saint Paul, Minnesota.

STATE OF MINNESOTA,
County of Hennepin:

Municipal Court, City of Minneapolis.

C. E. SCHAFF, as Receiver of the Missouri, Kansas & Texas Railway Company, a Corporation, Plaintiff,

vs.

J. C. FAMECHON COMPANY, a Corporation, Defendant.

Stipulation.

It is hereby stipulated that the foregoing proposed case may be taken as conformable to the truth and as containing all the evidence offered or introduced in the trial of the above entitled action, and all objections, rulings, orders, exceptions and all other proceedings of such trial, and that the same may be settled and allowed as a settled case herein by the Honorable Mathias Baldwin, the Judge who tried said case.

Dated this 9th day of September, 1919.

112

D. R. FROST,
Attorney for Plaintiff.
C. B. ELLIOTT,
G. H. SMITH
Attorneys for Defendant.

STATE OF MINNESOTA,
County of Hennepin:

Municipal Court, City of Minneapolis.

C. E. SCHAFF, as Receiver of the Missouri, Kansas & Texas Railway Company, a Corporation, Plaintiff,

vs.

J. C. FAMECHON COMPANY, a Corporation, Defendant.

Judge's Certificate.

I hereby certify that the foregoing case has been examined by me and found conformable to the truth and to contain all the evidence offered or introduced in the trial of the above action and all objections, rulings, exceptions and orders, and all other proceedings of such trial, and I hereby settle and allow the same as a settled case herein.

Dated September 9, 1919.

MATHIAS BALDWIN,
Judge.

Endorsed on Settled case: Filed Sept. 9, 1919. Harry Moore, clerk.

113 Endorsed: Filed February 6th, 1920. Herman Mueller, Clerk.

(Copy.)

2/6/1920.

Hennepin County.

#24.

21597.

C. E. SCHAFF, as Receiver of the Missouri, Kansas & Texas Ry. Co., a Corporation, Appellant.

vs.

J. C. FAMECHON COMPANY, a Corporation, Respondent.

Quinn, J.

Syllabus.

1. Under the Interstate Commerce Rule a carrier is required to file with the Commission its schedule of rates and tariffs, and to promulgate and distribute the same so that shippers may have access thereto and ascertain its terms.

2. To establish and render operative a five dollar rental for a refrigerator car in which potatoes are shipped from points in Minnesota to points in Oklahoma, over connecting lines, the tariff schedule must be filed and published at the point of origin.

Affirmed.

Opinion.

Appeal from a judgment of the municipal court of the city of Minneapolis in favor of the defendant. The issue is whether a charge of five dollars, in addition to the regular line haul rate, is collectible as rental for a refrigerator car in shipping potatoes by rail from points in Minnesota over connecting lines to points in Oklahoma and Texas.

During the fall and winter season, defendant loaded and shipped by rail in refrigerator cars, ordered in the usual course of business, seven car loads of potatoes from points in Minnesota to points in Oklahoma and Texas, over connecting lines. The Missouri, Kansas & Texas Ry. Co., for which plaintiff is receiver, was the terminal carrier, and the Northern Pacific and Great Northern Rail-
114 ways the initial carriers. The shipments were made as follows:

One car over the Northern Pacific from Rush City, Minnesota, to Muskogee, Oklahoma, in November, 1914.

One car over the Northern Pacific from Rush City, Minnesota, to Oklahoma City, Oklahoma, in January, 1915.

One car over the Great Northern from Grasston, Minnesota, to Muskogee, Oklahoma, in February, 1915.

One car over the Great Northern from Isanti, Minnesota, to McAllister, Oklahoma, in March, 1915.

One car over the Great Northern from Bock, Minnesota, to Sulphur Springs, Texas, in March, 1915.

One car over the Great Northern from Grasston, Minnesota to Coalgate, Oklahoma, in February, 1916.

One car over the Great Northern from Isanti, Minnesota, to Durant, Oklahoma, in February, 1916.

The terminal carrier received the potatoes, delivered them at their destinations in the usual course of traffic and collected from the shipper thereof, in excess of the regular line haul rate, the sum of five dollars on each shipment as rental for such refrigerator cars, excepting the one car shipped in 1914, where the excess was not collected. Thereafter defendant made claim against said railway company for an overcharge of five dollars on each of the four shipments so made in 1915, contending that the carrier was not legally entitled to collect a rental for such refrigerator cars. The railway company thereupon refunded to the defendant twenty dollars, which it claims to have done by mistake and a misunderstanding of the tariffs and schedules relating thereto. The plaintiff now seeks to recover five dollars rental for the car shipped in 1914, and the twenty dollars so

refunded. Defendant, in its answer, puts in issue the allegations of the complaint and pleads a counterclaim for the rental paid on the two cars shipped in 1916. Defendant had judgment for ten dollars with interest and costs and plaintiff appeals.

For tariff purposes the country is divided into three sections, in each of which the carriers, by methods of their own, establish
115 rates and charges applicable therein. The classifications enumerate commodit-es in an alphabetical list, and separate them into different classes as a basis for assessing and collecting freight charges. The Western Classification, generally speaking, governs shipments moving within territory west of the Mississippi River. In it are various subdivisions, one of which includes the Southwestern Lines with whose tariffs we have to do in the present case. The duly established freight rate on potatoes in carloads from points of origin to points of destination named in the pleadings was contained in tariffs known as "Southwestern Lines' Tariffs." These tariffs were subject to the "Southwestern Lines' Classification Exceptions and Rules Circulars." It appears by stipulation that neither this circular nor the Southwestern Lines' Tariffs circular was filed or published at any of the stations of origin, but that they were on file at certain designated offices of the Northern Pacific and Great Northern Railways in Minneapolis and St. Paul, and at various points in other states; that at the time the shipments were made, Western Trunk Line Circular No. 12, was on file at the points of origin and destination and that it was the only tariff issued by any of the carriers participating in the transportation of the shipments in question, which contained a five dollar rental provision for refrigerator cars; that such circular was printed and filed with the Interstate Commerce Commission and contained the following provision:

"Rule No. 3.—Rental charges on Insulated Cars.—When shipper orders a refrigerator or other insulated car to be heated by him or to move without heat, a charge of $5 per car per trip will be made for use of car and will accrue to the owner thereof."

It is urged that the rental charge became effective and was collectible because of the provision of Circular No. 12 above quoted, when considered in connection with the Southwestern Lines' Classification Exceptions and Rules, which makes specific reference to Circular No. 12, and which it is claimed modified the Western
116 Classification so that shipments transported thereunder were subject to such further charges as were contained in publications of participating carriers, on file with the Interstate Commerce Commission.

The trouble with this contention, so far as it might apply to the case at bar, is that neither the Southwestern Lines' Tariffs, nor the Southwestern Lines' Classification Exceptions and Rules, was, at the times in question, in the hands or custody of the agents of the initial carriers at the points of origin, nor had they been posted at such points. The Interstate Commerce Act, Sec. 6, provides:

"That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep

open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier. * * * (34 U. S. Stat. 586.) Such schedules shall be plainly printed in large type and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public * * *." (34 U. S. Stat. 586.)

The Western Trunk Lines do not include any of the Southwestern Lines which are subject to the Southwestern Lines' Tariffs. And it is clear from the stipulation of the parties that the Exceptions and Rules Circular were not kept at the stations of origin. To effectively establish a legal rate or charge, such as the rental here in question, a compliance with the provision of section 6 of the Interstate Commerce Law quoted is essential, so far as relates to the publication of the schedules therein provided for. The rule of the Commission dated June 2, 1908, which was in force at the time of the shipments in question, provides:

"Every carrier, subject to the provisions of the Act to Regulate Commerce * * * shall place in the hands and custody of its agent or other representative at every station, warehouse or office at which passengers or freight are received for transportation, and at which a station agent, or a freight agent, or a ticket agent is employed, all of the rate and fare schedules which contain rates and fares applying from that station or terminal, or other charges applicable to that station, including the schedules issued by that
117 carrier or its authorized agent and those in which it has concurred."

The publication prescribed by this rule is a condition precedent to the establishment and putting into effect such rates. The publication is for the information and advantage of the public, for the inspection of the shippers at the various points throughout the country. Gulf etc. Ry Co. v. Hefley, 158 U. S. 98, 39 L. Ed. 910; Atlantic, K. & N. Ry. Co. v. Horne, 106 Tenn. 73, 59 S. W. 134; Pecos River R. Co. v. Reynolds Cattle Co. (Tex.) 135 S. W. 162.

It seems to be well settled that the schedule must first be filed with the Commission and then they must be printed and kept open to public inspection at the various stations at which they are to have effect. U. S. v. Miller, 223 U. S. 599; Virginia-Carolina Peanut Co. v. Atlantic Coast Line Co. 82 S. E. 1. In Oregon R. & N. Co. v. Thisler, 90 Kan. 5, 133 Pac. 539, it is said that the carrier is required to file schedules with the Commission and promulgate them so that the shippers might have access thereto. Otherwise such rates do not become effective. Under the situation as it existed at the points of origin of the shipments under consideration, neither the station agent nor the shipper, by reference to any tariff schedules at their com-

mand, could discover that the Western Trunk Line Circular No. 12, was to be considered in connection with the rates, or rental charges, with respect to shipments under the Southwestern rate tariffs.

The Southwestern Lines' Exceptions and Rules Circular not having been on file at the points of origin, there were no tariffs on file to which shippers could refer to ascertain the rates of transportation, as we understand, containing any reference to the Western Trunk Line Circular No. 12. So there was nothing to indicate that Circular No. 12 had in any manner to do with shipments over the Southwestern lines or the tariffs pertaining thereto. It follows that the rates contended for had not become legally effective at the points in question.

Judgment affirmed.

118 STATE OF MINNESOTA:

Supreme Court.

21507. 21597.

C. E. SCHAFF, as Receiver of the Missouri, Kansas & Texas Railway Company, a Corporation, Appellant,

vs.

J. C. FAMECHON COMPANY, a Corporation, Respondent.

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the Judgment of the Court below, herein appealed from, to-wit, of the Municipal Court within and for the County of Hennepin be and the same hereby is in all things affirmed.

And it is further determined and adjudged that Respondent herein, do have and recover of Appellant herein the sum and amount of Fifty-two and 50/100 Dollars, ($52.50) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed March 12th, A. D. 1920.

By the court.

Attest. HERMAN MUELLER,
Clerk.

Statement for Judgment.

Statutory Costs	$25.00
Printer	27.00
Clerk	....
Acknowledgments	.50
Return	....
Postage and Express	....
Filing Mandate	....
Transcript	....
Appeal Bond	....
Total	$52.50

[Endorsed:] State of Minnesota, Supreme Court. Transcript of Judgment. Filed Mch. 12th, A. D. 1920. Herman Mueller, clerk.

119 STATE OF MINNESOTA:

In Supreme Court.

C. E. SCHAFF, as Receiver of the Missouri, Kansas & Texas Railway Company, a Corporation, Appellant,

vs.

J. C. FAMECHON COMPANY, a Corporation, Respondent.

Petition for Writ of Error.

C. E. Schaff, as Receiver of the Missouri, Kansas & Texas Railway Company, appellant in the above entitled cause, feeling himself aggrieved by the judgment entered herein on the twelfth day of March, 1920, comes now, by Charles W. Bunn, his attorney, and petitions the said court for an order allowing said appellant to prosecute a writ of error to the Supreme Court of the United States under and according to the laws of the United States in that behalf made and provided; and also that an order be made fixing the amount of security which said appellant shall give and furnish upon said writ of error and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the Supreme Court of the United States, and your petitioner will ever pray.

Dated May 21st, 1920.

CHARLES W. BUNN,
Attorney for C. E. Schaff, as Receiver of the Missouri, Kansas & Texas Railway Company.

Writ of error allowed.
Dated May 21st, 1920.

CALVIN L. BROWN,
Chief Justice of the Supreme Court.

120 [Endorsed:] Supreme Court. Filed May 21, 1920. H. Mueller, clerk.

121 STATE OF MINNESOTA:

In Supreme Court.

C. E. SCHAFF, as Receiver of the Missouri, Kansas & Texas Railway Company, a Corporation, Appellant,

vs.

J. C. FAMECHON COMPANY, a Corporation, Respondent.

Assignment of Errors.

Now comes C. E. Schaff, as Receiver of the Missouri, Kansas & Texas Railway Company, the appellant above named, and says that the Supreme Court of the State of Minnesota erred in its decision and judgment in said cause as appears from the record therein and that the errors committed are as follows:

1. The Court erred in holding that a tariff of Interstate rates, printed and duly filed with the Interstate Commerce Commission and on file at many stations and offices of the participating carriers but not on file at the particular stations where the shipments involved in this action originated, was not published as to those shipments within the meaning of the Interstate Commerce Act and therefore was not a valid tariff as to such shipments; and thereby denied the validity of an authority exercised under the United States.

Wherefore said appellant, C. E. Schaff, as Receiver of the Missouri, Kansas & Texas Railway Company, prays that for the errors aforesaid the said judgment be reversed.

Dated this 21st day of May, 1920.

CHARLES W. BUNN,
Attorney for C. E. Schaff, as Receiver of the Missouri, Kansas & Texas Railway Company.

122 [Endorsed:] Supreme Court. Filed May 21, 1920. H. Mueller, clerk.

123 STATE OF MINNESOTA:

In Supreme Court.

C. E. SCHAFF, as Receiver of the Missouri, Kansas & Texas Railway Company, a Corporation, Appellant,

vs.

J. C. FAMECHON COMPANY, a Corporation, Respondent.

Bond.

Know all men by these presents that we, C. E. Schaff, as Receiver of the Missouri, Kansas & Texas Railway Company, a corporation, as principal, and the National Surety Company, a corporation, as

surety, are held and firmly bound unto the above named respondent, J. C. Famechon Company, a corporation, in the sum of Five Hundred Dollars ($500.00), to be paid to it and for the payment of which we bind ourselves and our successors and assigns firmly by these presents.

Sealed with our seals and dated the 21st day of May, 1920.

The condition of this obligation is such that, whereas, the said C. E. Schaff, as Receiver of the Missouri, Kansas & Texas Railway Company, appellant, seeks to prosecute his writ of error in the Supreme Court of the United States and to reverse the judgment rendered in the above entitled cause by the Supreme Court of the State of Minnesota,

Now, therefore, if the above named appellant shall prosecute his writ of error to effect and answer all costs and damages which
124 may be adjudged, if he fails to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

C. E. SCHAFF,
As Receiver of the Missouri, Kansas & Texas Railway Company.

(Signed) By CHARLES W. BUNN,
His Attorney.

[Corporate Seal.]

NATIONAL SURETY COMPANY,

(Signed) By L. A. GREEN,
Its Attorney in Fact.

(Sgd.) G. E. JOHNSON,
" M. FREDERICKSEN,
(As to Surety.)

STATE OF MINNESOTA,
County of Ramsey, ss:

On this 21st day of May, A. D., 1920, before me appeared L. A. Green, to me personally known, who, being by me duly sworn did say that he is the Attorney in Fact of the National Surety Company, the corporation described in and who executed the foregoing instrument, and that the seal affixed to said instrument is the corporate seal of said corporation and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said L. A. Green acknowledged said instrument to be the free act and deed of said corporation.

[Notarial Seal.] (Signed) G. E. JOHNSON,
Notary Public, Ramsey County, Minnesota.

My Commission expires Sept. 20, 1924.

The foregoing bond is hereby approved as a supersedeas this 21st day of May, 1920.

CALVIN L. BROWN,
Chief Justice, Supreme Court of Minnesota.

125 [Endorsed:] Supreme Court. Filed May 21, 1920. H. Mueller, clerk.

126 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Justices of the Supreme Court of the State of Minnesota, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Minnesota, before you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between C. E. Schaff, as Receiver of the Missouri, Kansas & Texas Railway Company, appellant, and J. C. Famechon Company, respondent, wherein was drawn in question the validity of an authority exercised under the United States and the decision was against its validity a manifest error hath happened to the great damage of the said appellant as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be given therein, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the 21st day of May, in the year of our Lord one thousand nine hundred and twenty.

[Seal U. S. Dist. Court, Dist. of Minnesota, Third Division.]

CHARLES L. SPENCER,
Clerk of the United States District Court
for the District of Minnesota.
By MARGARET L. MULLANE,
Deputy Clerk.

Writ allowed May 21, 1920.
CALVIN L. BROWN,
Chief Justice.

127 [Endorsed:] Supreme Court. Filed May 21, 1920. H. Mueller, clerk.

128 UNITED STATES OF AMERICA, *ss:*

To J. C. Famechon Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Minnesota,

wherein C. E. Schaff, as Receiver of the Missouri, Kansas & Texas Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Calvin L. Brown, Chief Justice of the Supreme Court of the State of Minnesota, this 21st day of May, in the year of our Lord, one thousand nine hundred and twenty.

CALVIN L. BROWN,
Chief Justice of the Supreme Court of the State of Minnesota.

Service of the foregoing citation is admitted and receipt of a copy thereof acknowledged this 21st day of May, 1920.

CHARLES B. ELLIOTT,
GEORGE H. SMITH,
Attorneys for J. C. Famechon Company.

129 [Endorsed:] Supreme Court. Filed May 21, 1920. H. Mueller, clerk.

130 & 131 STATE OF MINNESOTA:

In Supreme Court.

I, Herman Mueller, clerk of the said court, do hereby certify that there has been lodged with me as such clerk, in the matter of C. E. Schaff, as Receiver of the Missouri, Kansas & Texas Railway Company, appellant, vs. J. C. Famechon Company, a corporation, respondent:

1. The original bond, of which a copy is herein set forth;

2. Copies of the writ of error, as herein set forth,—one for each respondent and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in St. Paul, Minnesota, this 29th day of May, 1920.

[Seal of the Supreme Court, State of Minnesota.]

HERMAN MUELLER,
Clerk of the Supreme Court, State of Minnesota.

132 STATE OF MINNESOTA:

In Supreme Court.

C. E. SCHAFF, as Receiver of the Missouri, Kansas & Texas Railway Company, a Corporation, Appellant,

vs.

J. C. FAMECHON COMPANY, a Corporation, Respondent.

To the Clerk of the above-named court:

Will you please prepare transcript of record on writ of error carrying the above entitled cause to the Supreme Court of the United States for review, said transcript to consist of the following:

1. Complete return to your court as made by the Clerk of the Municipal Court of the city of Minneapolis, Minnesota, in which court said cause originated.

2. Transcript of all proceedings in the Supreme Court of Minnesota, including the judgment entered therein and the opinion of the court therein.

3. The original petition for writ of error, original assignment of errors, copy of bond, original writ of error, original citation and this praecipe for transcript.

4. Your certificate.

CHARLES W. BUNN,
Attorney for C. E. Schaff, as Receiver of the Missouri, Kansas & Texas Railway Company.

Due service of the foregoing praecipe and receipt of a copy thereof acknowledged this 21st day of May, 1920.

CHARLES B. ELLIOTT,
GEORGE H. SMITH,
Attorney- for J. C. Famechon Company, Respondent.

133 [Endorsed:] Supreme Court. Filed May 21, 1920. H. Mueller, clerk.

134 STATE OF MINNESOTA, *ss:*

Supreme Court.

I, Herman Mueller, Clerk of the Supreme Court of the State of Minnesota do hereby, in obedience to the writ of error herein issued, certify and return to the Supreme Court of the United States that the foregoing and annexed transcript of record is a full and complete transcript of the record, judgment, judgment roll and all of the proceedings had in said Supreme Court of the State of Minnesota in

the case between C. E. Schaff, as Receiver of the Missouri, Kansas & Texas Railway Company, appellant, and J. C. Famechon Company, respondent, including the opinion of said Supreme Court, filed upon the hearing in which the judgment herein was rendered.

I do further certify and return herewith a complete transcript of all the original files and papers (including the judgment roll, settled case, motion for amended findings or new trial, order denying said motion and notice of appeal to the Supreme Court of Minnesota) transmitted to this Court by the Clerk of the Municipal Court of the city of Minneapolis, Minnesota, in which court this cause originated.

I also return herewith the original petition for writ of error, original assignment of errors, copy of bond, original writ of error, original citation and praecipe for transcript of record.

I further certify that the foregoing constitutes a true, full and complete return to said writ of error.

In witness whereof I have hereunto set my hand and the seal of said Supreme Court of Minnesota at the Capitol, St. Paul, Minnesota, this 17th day of June, 1920.

[Seal of the Supreme Court, State of Minnesota.]

HERMAN MUELLER,
Clerk of the Supreme Court, State of Minnesota.

135 Supreme Court of the United States.

C. E. SCHAFF, as Receiver of the Missouri, Kansas & Texas Railway Company, a Corporation, Plaintiff in Error,

vs.

J. C. FAMECHON COMPANY, a Corporation, Defendant in Error.

Statement under Section 9 of Rule 10 of the Points on Which Plaintiff in Error Intends to Rely and of the Parts of the Record Which He Thinks Necessary for the Consideration Thereof.

For a reversal of the judgment below the plaintiff in error intends to rely upon the following points:

The court erred in holding that a tariff of interstate rates, printed and duly filed with the Interstate Commerce Commission and on file at many stations and offices of the participating carriers but not on file at the particular stations where the shipments involved in this action originated, was not published as to those shipments within the meaning of the Interstate Commerce Act and therefore was not a valid tariff as to such shipments; and thereby denied the validity of an authority exercised under the United States.

For the consideration of those questions plaintiff in error thinks it necessary to print only the following parts of the record:

1. The summons, appearing on p. 1 of the return.

2. The complaint, appearing on pp. 1-6 of the return.

3. The answer, appearing on pp. 6-8 of the return.

4. The reply, appearing on p. 8 of the return.

136 5. Findings, conclusions and order for judgment appearing on pp. 9-19 of the return.

6. Order denying motion to amend findings or for a new trial, appearing on pp. 27-28 of the return.

7. Judgment in Municipal Court, appearing on pp. 28-29 of the return.

8. Notice of appeal to Supreme Court of Minnesota, appearing at p. 29 of the return.

9. Settled case, appearing at pp. 30-112 of return, omitting from the settled case the following portions:

From the testimony of Harry M. Russell, omit beginning with the words on p. 44: "Shipments transported under the rates * * *" as far as to the following on p. 46: "Mr. Elliott: The defendant moves to strike * * *."

Also omit beginning with the question on p. 48: "Q. Now, please read what Exhibit D is" as far as to the following on p. 50: "Q. Will you state whether Exhibit C * * *."

Also omit beginning with the question on p. 51: "Q. Will you produce Supplement No. 26 * * *" as far as to the following on p. 54: "Mr. Frost: It is stipulated that the Northern Pacific Railway * * *."

Also omit from settled case that portion commencing with the words on p. 79: "Copy from front cover of Plaintiff's Exhibit D," the rest of p. 79, all of pp. 80, 81, 82, 83, 84, 85, 86 and on p. 87 to and including "(issued by G. P. Conard, Agent)."

10. Opinion of Supreme Court of Minnesota appearing on pp. 113-117 of return.

11. Judgment in Supreme Court of Minnesota appearing on p. 118 of the return.

12. Petition for writ of error, appearing on p. 119 of the return.

13. Order allowing writ of error, appearing on p. 119 of the return.

14. Assignment of errors, appearing on p. 121 of the return.

15. Bond on writ of error, appearing on pp. 123-125 of the return.

16. Writ of error, appearing on p. 126 of return.

137 17. Citation, with admission of service, appearing on pp. 128-129 of the return.

18. Clerk's certificate of lodgment, appearing on p. 130 of return.

19. Præcipe for transcript of record, appearing on p. 132 of return.

20. Clerk's certificate of authentication and return to writ of error, appearing on p. 134 of return.

CHARLES W. BUNN,
Attorney for Plaintiff in Error.

Due service of the foregoing statement and receipt of copy thereof is hereby acknowledged this 2nd day of July, 1920.

GEORGE H. SMITH,
CHARLES B. ELLIOTT,
Attorneys for Defendant in Error.

138 [Endorsed:] 413-20—27,770. P. E.

139 [Endorsed:] File No. 27,770. Supreme Court U. S., October Term, 1920. Term No. 413. C. E. Schaff, as receiver, &c., P. E., vs. J. C. Famechon Company. Statement of points relied upon and designation by plaintiff in error as to printing parts of record. Filed July 6th, 1920.

Endorsed on cover: File No. 27,770. Minnesota Supreme Court Term No. 413. C. E. Schaff, as receiver of the Missouri, Kansas and Texas Railway Company, plaintiff in error, vs. J. C. Famechon Company. Filed June 21st, 1920. File No. 27,770.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1921.

No. 91.

C. E. SCHAFF, AS RECEIVER OF THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY,
Plaintiff in Error,

vs.

J. C. FAMECHON COMPANY.

BRIEF FOR PLAINTIFF IN ERROR.

CHARLES W. BUNN.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1921.

No. 91.

C. E. SCHAFF, AS RECEIVER OF THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY,

Plaintiff in Error,

vs.

J. C. FAMECHON COMPANY.

STATEMENT.

This case comes here by writ of error from final judgment of the highest court of Minnesota and turns on whether a railway tariff filed with the Interstate Commerce Commission is valid, or on the contrary invalid because not filed at the particular railroad station where shipment originates. The Supreme Court of Minnesota held (and this

was the only question involved) that the tariff in question was invalid, though duly filed with the Commission, because not filed at the stations where shipments in question originated.

The facts are not in dispute and are briefly as follows:

The particular charge involved is one of five dollars per car per trip for the use of insulated or refrigerator cars in shipment of potatoes from several stations in Minnesota to points in Oklahoma and Texas over the lines of several connecting railways. The shipments originated on the Northern Pacific and Great Northern Railways and were finally delivered in Oklahoma and Texas by the Missouri, Kansas and Texas Railway Company, of which plaintiff in error is receiver. The delivering carrier collected a charge of five dollars for use of each insulated or refrigerator car and its agent refunded this charge through mistake and a misunderstanding of the tariffs. The suit is brought to recover this charge.

Three tariffs were introduced in evidence. First a general tariff naming rates on a multitude of commodities and classes in Western Classification Territory, that is west of the Mississippi River. This tariff named carriage charges only and did not cover charges for special services, like protection of goods from frost. The second tariff is Western Trunk Line Circular No. 12 (Transcript p. 48 and following). It is applicable on Western Trunk Lines, was concurred in by all the carriers

concerned and contains rules covering transportation of potatoes and vegetables, particularly relating to their protection from frost. Rule 1 covers cars heated by shipper, rule 2 covers cars heated by the carrier, rule 3 covers use of insulated or refrigerator cars heated or unheated and contains the following (Transcript p. 50):

> "When shipper orders a refrigerator or other insulated car to be heated by him or to move without heat, a charge of $5.00 per car per trip will be made for use of car and will accrue to the owner thereof."

This tariff, as well as the first tariff above referred to (which first tariff is not involved in this case), were duly filed and published and were on file at the stations in Minnesota where shipments in question originated.

Next as to the third tariff; this was a tariff issued by Southwestern Lines, including the lines delivering in Oklahoma and Texas, and concurred in by all the carriers concerned, and states exceptions to the Western Classification and special rules and conditions applicable to shipments to and from Oklahoma and Texas. Parts thereof are printed Transcript, p. 43. It contains this rule:

> "Shipments transported under the rates, rules and regulations prescribed in this classification, and in tariffs made subject to this classification, shall be subject to such further charges and allowances as are contained in publications of the participating carriers lawfully on file with the Interstate Commerce Commission relating to:"

various special services enumerated, among which is "Car rental." This Southwestern Line tariff is the one, which though duly published and filed with the Commission and filed at many of the more important stations on Northern Pacific and Great Northern in Minnesota and elsewhere, was not on file at the particular stations where shipments in question originated.

The Supreme Court of Minnesota held that Circular No. 12, Western Trunk Lines, the second tariff above referred to, which was on file at the originating stations, was not applicable to shipments destined by Southwestern Lines to Oklahoma and Texas, unless made applicable by Southwestern Lines Tariff, the third tariff above stated, and that this tariff, while adopting by reference Western Trunk Line Circular No. 12, was not a valid tariff as to shipments in question because not filed at stations where those shipments originated.

The statement we have made of the facts, while differing in language, is identical in substance with statement by the Supreme Court of Minnesota, printed Transcript, pp. 62, 63.

Error was properly assigned (Transcript p. 67).

JURISDICTION.

The judgment of the Supreme Court of Minnesota is reviewable by writ of error. By act of September 6, 1916 (39 Stat. 726), writ of error is the proper writ of review "where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity."

The clause "or an authority exercised under the United States" describes cases in addition to those covered by the preceding clause, "the validity of a treaty or statute", and therefore includes cases involving no inquiry into the validity of a statute; cases turning on the construction of a statute provided the issue involves the validity of an authority exercised under the United States.

The commerce act not only confers on carriers a right to receive the revenues defined in the tariffs, but is a command with penalties that carriers collect those revenues. The insistence of the law is primarily for protection of the public against discrimination. The act gives every carrier an authority to collect tariff charges.

And where a case turns on the issue directly raised and necessarily involved, whether a tariff is valid, there is therefore drawn in question the validity of an authority exercised under the United States. The question in this case decided by the state court was not the interpretation of a tariff or the extent or nature merely of some right claim-

ed under it, but whether the tariff had any *validity;* whether a tariff, filed with the Interstate Commerce Commission and otherwise valid, was *invalid* because not filed at stations on the line.

The case is the same in this respect as *Northern Pacific Railway Company v. State of North Dakota,* 250 U. S. 135. In that case the State court held tariffs made by the Director General invalid and tariffs effective, which were previously on file with the Railroad Commission of North Dakota and which by the state law could not be changed without consent of the Commission. The case did not involve the validity of the federal control act, but only whether that act, properly interpreted, gave the Director General the right to make tariffs. After careful consideration of counsel writ of error was sued out in that case on the ground that it involved the validity of an authority exercised under the United States. The court evidently took that view without much difficulty as the question of jurisdiction is not specially discussed in the opinion.

The case of *Buck v. Colbath,* 3 Wall. 334, is in point. It was there held that where a marshal had seized goods on attachment from the federal court the decision of the state court against the authority of the marshal drew in question "the validity of an authority exercised under the United States." Had the carrier in this case to secure its charges seized and held the goods transported, replevin or trespass for the goods would have presented a

case more strikingly like *Buck v. Colbath*. But an action to recover the charges equally involves the validity of an authority exercised under the act to regulate commerce.

It is believed there is no decision of the court which throws doubt on the jurisdiction.

New York Central & Hudson River Railroad Company v. York & Whitney Company, May 16, 1921, is not opposed to our view. The Supreme Court of Massachusetts in the judgment there under review had held that tariffs were valid, being filed with the Interstate Commerce Commission, even though not publicly posted by the carrier, and had based its ruling that the consignee was not liable for the charges in question on a finding of fact that the consignee was not a party to the tariff. In making this finding it professed to determine principles of general law. The judgment there involved did not deny the validity of the tariff, which is the whole judgment here. So cases like *Yazoo and Mississippi Valley Railroad Company v. Nichols & Company*, opinion by Mr. Justice Brandeis June 1, 1921, which was on writ of certiorari, involve questions of interpretation of tariffs, applicability of tariffs, interpretations of the act of Congress, and of principles of general law; in other words, questions of federal rights as to which certiorari is the only remedy. They are to be distinguished from questions of the validity of a statute or of a federal authority, in respect of which the remedy is writ of error.

The case dismissed for want of jurisdiction in *Northern Pacific Railway Company v. Solum*, 247 U. S. 477 (see p. 481), was an action for damages against the Railway Company for violation of an alleged right given by the unwritten law; viz., a right of the shipper to have an unrouted shipment put over the cheapest route. Two routes were available, a different tariff applying to each; but there was no question of the validity of either tariff.

The case here does not involve a dispute about the facts upon which authority was exercised, but denies the legality of the authority. See *Ireland v. Woods*, 246 U. S. 323, 328; *Champion Lumber Co. v. Fisher*, 227 U. S. 445, 450.

This case meets the requirement laid down by the court in *United States v. Lynch*, 137 U. S. 280, 285, where the court said:

> "The validity of a statute or the validity of an authority is drawn in question when the existence, or constitutionality, or legality of such statute or authority is denied, and the denial forms the subject of direct inquiry."

Baltimore & Potomac Railroad Company v. Hopkins, 130 U. S. 210, is authority for our view. That was a writ of error to the Supreme Court of the District of Columbia under a statute quite like the clause of the Judicial Code in question. Suit was brought by Hopkins in the Supreme Court of the District against the Baltimore & Potomac Railroad

Company for injuries alleged to have resulted from maintenance of a nuisance in front of his premises. The Railroad Company sought to justify by pleading a charter which gave a right to build and operate a railroad from Baltimore to a defined terminus in Washington, and pleaded that it had built on the authorized route. But there was nothing in the charter which gave it a right to maintain in public places yards which had become a nuisance. The court of the District had instructed the jury that no damages could be recovered for the building or operation of the railroad and for the building of as many tracks as the president and board of directors might deem necessary; that all stoppage of trains and shifting of cars necessary for operation of the railroad were lawful. The Railroad Company had been held exempt from all damage resulting from careful conduct of its business, and liable only for careless and unlawful acts. The validity of the Railroad Company's authority was therefore not questioned by the judgment sought to be reviewed. The decision strongly supports our view because it is clear from the opinion that had the court of the District by its judgment held the company's charter invalid, or interfered with the company in respect of its lawful authority, the writ of error would have been sustained.

THE MERITS.

The merits need little discussion. In Minnesota the syllabus of the Supreme Court's opinion is written by the judge delivering the opinion. The syllabus heads the opinion at Transcript, p. 61. A glance at it will show what will be confirmed by reading the opinion, that the Supreme Court of Minnesota, construing the Interstate Commerce Act, held it required filing of every tariff at the shipping station and that a tariff was invalid for any purpose if not so filed, though otherwise duly filed and published as required by the act.

The contrary rule has been so repeatedly decided by this court that it is not necessary to do more than cite the cases. *Berwind-White Coal Mining Co. v. Chicago & Erie R. R. Co.*, 235 U. S. 371; *American Express Co. v. U. S. Horse Shoe Co.*, 244 U. S. 58; *Illinois Central Railroad Co. v. Henderson Elevator Co.*, 226 U. S. 441; *Texas & Pacific Ry. Co. v. Cisco Oil Mill*, 204 U. S. 449.

It was not questioned by the State court that the Southwestern Lines tariff, in our statement spoken of as the "third tariff", by proper reference referred to the Western Trunk Line Circular No. 12, which contained the car rental charge sued for and which was on file at the shipping stations. It may not be out of place, however, to suggest that how far one circular or tariff may be incorporated into another by reference is purely a question for the Interstate Commerce Commission and its discretion is controlling. As to this particular tariff

the Commission, after full hearings has held that the car rental charge is properly referred to and therefore a part of the Southwestern Lines tariff hereinbefore spoken of as the "third tariff." *Hale-Halsell Grocery Co. v. Missouri, Kansas & Texas Ry. Co.*, 42 I. C. C. Rep. 491; 45 I. C. C. Rep. 523.

CHARLES W. BUNN,
for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921.

No. 91.

C. E. SCHAFF, as Receiver of the MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY,

Plaintiff in Error,

vs.

J. C. FAMECHON COMPANY,

ADDITIONAL SUGGESTIONS IN SUPPORT OF THE JURISDICTION.

The Alabama and Vicksburg Railway Co. v. Journey, November 7, 1921, opinion by Mr. Justice Brandeis, involved in respect of jurisdiction the identical point sustaining the jurisdiction in

Northern Pacific Railway Co. v. State of North Dakota, 250 U. S. 135. The question in each case was the validity, under the federal control act, of an authority exercised by the Director General of Railroads; in the North Dakota case whether his tariff was valid, in The Alabama and Vicksburg Railway case whether his order relating to venue of suits was valid. In *The Alabama and Vicksburg Railway Co. v. Journey* both writ of error had been sued out and certiorari had been issued. Writ of error was dismissed, certiorari granted and judgment reversed without any discussion, and at least without any express ruling that there was no jurisdiction by writ of error.

We venture the suggestion that the court, considering that it had jurisdiction under either writ, regarded it as immaterial which writ was dismissed. It cannot have been intended without discussion to hold that there was no jurisdiction of writ of error, for the case was quite clearly the same as *Northern Pacific v. North Dakota*, and both are quite clearly cases involving the validity of an authority exercised under the United States. It is said in the opinion of the court in *Dahnke-Walker Milling Co. v. Bondurant*, December 12, 1921, that some cases may fall on both sides of the line, that is may be cases subject both to writ of error and certiorari. It seems very clear that this is true. The act of September 6, 1916, amending Judicial Code, Sec. 237, gives jurisdiction by certiorari to review decisions

> "where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is either in favor of or against the title, right, privilege, or immunity especially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority."

It is difficult to conceive a case where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, the decision being against their validity (in which cases writ of error lies under the first clause of the section), which does not also fall under the class of cases described in the last clause of the section above quoted. Such cases are subject to both writs. This we think must explain the judgment in *The Alabama and Vicksburg Railway Co. v. Journey.*

As Mr. Justice Brandeis pointed out in *Dahnke-Walker Milling Co. v. Bondurant*, December 12, 1921, cases of writ of error or appeal from the District of Columbia and the Territories under the act of March 3, 1885, and under Sec. 250 of the Judicial Code are in point as defining the cases where writ of error lies under the act of September 6, 1916. Among Territorial and District of Columbia cases supporting the jurisdiction are *Steinmetz v. Allen*, 192 U. S. 543; *McLean v. Denver and Rio Grande R. R. Co.*, 203 U. S. 38, 47; *Smoot v. Heyl*, 227 U. S. 518, 522.

CHARLES W. BUNN.

IN THE

Supreme Court of the United States.

October Term, 1921.

No. 91.

C. E. SCHAFF, AS RECEIVER OF THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, A CORPORATION,
Plaintiff in Error,

vs.

J. C. FARMERS COMPANY, A CORPORATION,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

CHARLES SUMNER ELLIOTT,

Supreme Court of the United States.

October Term, 1921.

No. 91.

C. E. SCHAFF, AS RECEIVER OF THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, A CORPORATION, *Plaintiff in Error,*

vs.

J. C. FAMECHON COMPANY, A CORPORATION, *Defendant in Error.*

BRIEF FOR DEFENDANT IN ERROR.

The issues are fairly presented in plaintiff-in-error's statement of facts. The Southwestern lines tariff which attempted to incorporate by reference the Western Trunk Line Circular No. 12, was not filed at the stations where these shipments originated as required by the Interstate Commerce statute and the rules made by the Interstate Commerce Commission in accordance therewith. The supreme court of Minnesota held that filing of the tariff schedules at the various stations was necessary for legal publication, and as there had been no such publication of a rental charge for the use of a refrigerator car, it was never legally established and therefore unauthorized and its collection illegal.

The plaintiff-in-error says that this Southwestern line tariff "was duly published and filed with the commission." It was filed with the commission, and at one station in Minnesota. But it was never *published* and therefore never became effective. Not being filed, of course, it was not posted but no question of the effect of a failure to post the schedules is involved.

JURISDICTION.

The greater part of the brief of the plaintiff-in error is devoted to the question of the jurisdiction of this court. A writ of error is proper to review a case only "where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against the validity."

The decision of the Supreme Court of Minnesota does not draw in question the validity of the Interstate Commerce Statute or the rules of the Interstate Commerce Commission or any authority exercised under the United States. To the contrary, it in every respect sustains such statute, and the rule of the Commission, and holds that the particular charge is illegal because the carrier ignored the requirements of the statute and rules.

THE MERITS.

The Minnesota Court held that a tariff not filed at the station is not in effect at that station because never established by proper publication as required by the statute and the rule of the Interstate Commerce Commission. As the court said,

it seems to be well settled that the schedules must be filed with the Commission and then they must be printed and kept open for public inspection at the various stations at which they are to have effect. This tariff was on file at the offices in Minneapolis and St. Paul, but at no other stations in the state of Minnesota (Rec., p. 15). The conditions are thus described by the Minnesota Court.

> "Under the situation as it existed at the points of origin of the shipments under consideration neither the station agent nor the shipper, by reference to any tariff schedules at their command, could discover that the Western Trunk Line Circular No. 12, was to be considered in connection with the rates, or rental charges, with respect to shipments under the Southwestern rate tariff. * * * So, there was nothing to indicate that Circular No. 12, had, in any manner, to do with shipments over the Southwestern lines or the tariffs pertaining thereto. It follows that the rates had not become legally effective at the points in question" (Rec., p. 64, 145 Minn, 108, 112).

Requirements with reference to Publication of Tariffs.

Plaintiff-in-error, ignores the difference between the publication of a tariff which is essential for its validity, and *posting* copies of the schedules in stations. The distinction is clearly made in *United States v. Miller*, 223 U. S. 599, where Mr. Justice Vandevanter in considering the effect of a failure to post copies of schedules stated that,

> "publication and posting in the sense of the act are essentially different."

The statute and Rule of the Interstate Commerce Commission.

Section 6 (1) of the Interstate Commerce Law (U. S. Comp. Stat. Vol. 8, Sec. 8569) which deals with the establishment of tariffs provides that:

> "Every common carrier subject to the provisions of this act shall file with the Commission created by this act, and print and keep open to public inspection, schedules showing all the rates, fares and charges for transportation between different points on its own route and points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate has been established. * * * The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, or privileges or facilities granted or allowed, and any rules or regulations which in any wise change, affect or determine any part of the aggregate of such aforesaid rates, fares and charges, or the value of service rendered to the passenger, shipper or consignee. Such schedules shall be plainly printed in large type and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected."

The statute (Sec. 6 (6)) provides also that:

> "The Commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection, shall be prepared and arranged

> and may change the same from time to time as may be found expedient."

As said in *Gulf etc. R. Co. v. Hefley*, 158 U. S. 98, the Interstate Commerce Commission is,

> "given power to prescribe the measure of publicity to be given and the places in which the joint tariff shall be published."

The rules of the Commission, made in pursuance of the authority conferred by the interstate commerce law, have the force and effect of law.

Under this authority, the Commission on June 2, 1908, issued and promulgated the following rule:

> "Every carrier, subject to the provisions of the Act to Regulate Commerce (excepting those to which special and specific modifications have heretofore been granted) shall place in the hands and custody of its agent or other representative at every station, warehouse or office at which passengers or freight are received for transportation, and at which a station agent, or a freight agent, or a ticket agent is employed, all of the rates and fare schedules which contain rates and fares applying from that station or terminal, or other charges applicable at that station, including the schedules issued by that carrier or by its authorized agent and those in which it has concurred" (Rec., 53).

The rule was in force at the time of the shipments in question. The modifications made on October 12, 1915, effective December 1, 1915, did not change the provisions above quoted.

Thus under the statute three things are essential to establish a valid tariff. The schedules, showing fares and charges, (1) must be filed with the commission, (2) they must then be printed,

and (3) thereafter kept open for public inspection.

In order that the schedules may be kept "open to public inspection" the Rule of the Commission requires that they must be placed in the hands and custody of the carrier's agent or other representative at every station, warehouse or office at which passengers or freight are received for transportation. This is the prescribed manner of publication and until such publication is made the tariff is not established.

It is now settled that the provision with reference to posting the rates at the stations is not a part of the publication, and that the failure to comply therewith does not render invalid a tariff which has been once established by proper publication.

In the cases which hold that posting is not essential to the validity of the tariff the schedules had been placed on file at the stations. In *Hale-Halsell Grocery Co. v. Mo. Kansas & Texas R. Co.*, 15 I. C. C. 254, in discussing this particular $5.00 rental, the Commission after holding that the rates and rules and regulations may be published separately and that when so published the regulations became part of the rate, said:

> "It is unimportant therefore that the car schedule rental was not posted in stations in Oklahoma; it was only necessary that it be posted *or* filed in the stations of the originating lines by which the refrigerator cars were furnished."

Of course, posting would involve placing the schedules in the hands of the agents, which is the essential elementation of publication.

United States v. Miller, 223 U. S. 599, was a criminal proceeding against a shipper for knowingly accepting a rebate from a carrier in violation of the Interstate Commerce law. The exact question was "whether compliance with the requirements with respect to posting of tariffs in the depots, stations, and offices of the carrier is essential to bring a tariff within the descriptive terms of that provision." After quoting the language of the act to the effect that no carrier, unless otherwise provided by this section, shall engage or participate in the transportation of passengers or property as defined in the act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed *and* published in accordance with the provision of the act, Mr. Justice Van Devanter said:

> "It is the contention of the defendants that a tariff is not published in the sense in which the act used that term unless printed copies are 'kept posted in two public and conspicuous places in every depot' etc., and it was this contention that prevailed in the Circuit Court. But in our opinion it is not sound. Publication and posting, in the sense of the act, are essentially distinct. This is the import of the provision that the requirements relatent to 'publication, posting and filing' may be modified by the Commission in special circumstances, for after publication and posting, mention of the latter was unnecessary. And from all the provisions on the subject it is evident that the publication intended consists of promulgating and distributing the tariff in printed form preparatory to putting it into effect while the posting is a continuing act to enjoin upon the carrier while the tariff remains operative, as a means of affording special facilities to the public for ascertaining the rate in force thereunder.

> In other words, publication is a step in establishing rates, while posting is a duty arising out of the fact that they have been established. Obviously, therefore, posting is not a condition to make a tariff legally operative. Neither is it a condition to the continued existence of a tariff once legally established. If it were the inadvertence or malicious destruction or removal of one of the posted copies would dis-establish or suspend the rates, a result which evidently is not intended by the act, for it provides that rates, once lawfully established, shall not be changed otherwise than in the mode prescribed."

In *Texas & P. Co. v. Cisco Oil Mills*, 204 U. S. 449, the rates had been established by filing the schedules with the Interstate Commerce Commission and furnishing copies to the agents at its various freight offices, but they were not posted. It was contended that this was not sufficient. The court said:

> "The filing of the schedules with the Commission and the furnishing by the railroad company of copies to its freight offices, incontrovertibly evidenced that the tariff of rates contained in the schedule had been established and put in force as mentioned in the first sentence of the section, and the railroad company could not have been heard to assert to the contrary. The requirements that schedules should be 'posted in two public and conspicuous places in every depot' etc., was not made a condition precedent to the establishment and putting in force of the tariff of rates but was a provision based upon the existence of an established rate, and plainly had for its object the affording of special facilities to the public for ascertaining the rate actually in force. To hold the clause had the far-reaching effect claimed would be to say that it was the intention of Congress that the negligent posting by an employee of but one, instead of

> two copies of the schedule, or the neglect to post either would operate to cancel the previously established schedule, * * * a conclusion impossible of acceptance. While section 6 forbade an increase or reduction of rates, etc., 'which have been established and published as aforesaid,' otherwise than as provided in the section, we think the publication referred to was that which caused the rates to become operative."

It will be observed that the schedules had been filed with the Commission and copies thereof furnished to the freight offices and it was this that "constituted the publication" and caused the rates to become operative.

In *Kansas City S. R. Co. v. Albers, Commission Co.*, 223 U. S. 594, the *Cisco Oil Mill case* was approved. The court said:

> "Although it was shown that the schedules embodying this rate were regularly printed, duly filed with the Interstate Commerce Commission, and kept open to public inspection at the freight offices of the garnishee at Kansas City and other points, it was not shown that copies were posted and published in conspicuous places in those offices as required by Section 6, of the Interstate Commerce Act. Posting, however, was not essential to make rates legally operative and was required only as a means of affording special facilities to the public for ascertaining the rates *actually in force*."

That the state courts understand that under the decisions of this court the publication of a tariff requires that the schedules be filed at the stations where passengers or freight are to be received appears from numerous decisions. In *Virgina-Carolina Peanut Co. v. Atlantic Coast Line Co.*, 116 N. C. 63, 82 S. E. 1, the Court said:

"If we refer again to the first clause of Section 6, we find that the schedule must first be filed with the Commission and that it must be 'printed and kept open to public inspection.' This requires distribution to and among the different stations or depots at which the schedule of rates must have effect, and this is the construction the highest Court has placed upon it. The act in this respect, is obscurely worded, as no precise definition of the words 'published as aforesaid,' or of the word 'published', so that we can know with perfect certainty what kind of publication was intended. It evidently means something to which it can fairly and reasonably be referred is the additional requirement that the schedules shall be 'printed and kept open for public inspection,' and this is 'promulgation and publication' as authoritatively declared in *U. S. v. Miller*, 223 U. S. 599. * * * *It appears then that 'publication' means 'promulgation and distribution' and is not confined to a mere filing of the schedules with the Commission, it being something besides that, or in addition to it.*"

In *Hunter v. St. Louis & S. F. R. Co.*, 167 Mo. App. 624, 150 S. W. 733, it was said that "to prove the establishing of a rate for a particular station, it must be shown that the printed schedules had been furnished to that station, or to the agent in charge thereof."

Oregon R. & N. Co. v. Thisler, 90 Kan. 5, 133 Pac. 539, it was held that the carrier is required to file with the Commission its schedules of rates *and also* to promulgate and distribute them in order that the shipper may have access to them and ascertain their terms. "Certainly," said the Court, "the mere filing with the Commission could give the shipper no practical means of ascertaining the

rates, and hence their promulgation and distribution were by force of necessity as well as by force of the statute made necessary."

In *Pecos River R. Co. v. Reynolds Cattle Co.*, (Tex. Civ. App.), 135 S. W. 162, it was held that under Section 6 of the Interstate Commerce Act it is not sufficient that the rates are filed with the Commission. In order to establish the tariff they must be on file at the station, or with the agent of the carrier.

THE CASES CITED BY PLAINTIFF-IN-ERROR.

The cases upon which the plaintiff-in-error relies merely hold in substance that when the schedules are filed with the Interstate Commerce Commission and copies placed in the hands of the agents at the various stations, the tariff is duly published and established, and that the failure to subsequently post copies of the schedules in the various stations does not render the tariff invalid.

In *Texas & Pacific R. Co. v. Cisco Oil Co.*, 204 U. S. 449, copies of the schedules had been filed at the stations and that having been done it was held that the failure to post copies did not invalidate the tariff.

Whether the tariffs considered in *American Express Co. v. United States Horse Shoe Co.*, 244 U. S. 58, had been filed at the stations does not appear from the decision. Schedules were not posted and it was held following the earlier case that the failure to post did not affect the validity of the tariff.

In *Berwind-White Coal Mining Co. v. Chicago & Erie Railroad Co.*, 237 U. S. 371, the question was whether a certain demurrage tariff was in proper form. It is quite certain that the mind of the court was not directed to the question of the effect of failure to make publication as required by the rule of the Interstate Commerce Commission. The carrier filed with the Commission a book of rules of the Chicago Car Service Association of which it was a member, relating to charges for demurrage and a few days thereafter wrote a letter to the Commission stating that the demurrage charge would be one dollar per day. The contention of the shipper was that such documents were not sufficiently formal to comply with the law. That is, it was a question of the form and substance of the documents and not of the manner of publication. "The contention" said the Chief Justice, "is without merit. The documents were received and placed on file by the Commission without any objection as to their form, and it is certain that as a matter of fact they were adequate to give notice." Whether copies were distributed at stations did not appear. They were not posted and following earlier cases, the court said that this was of no consequence. The case was disposed of in a very short opinion, and it is evident that the question now before the court was not considered.

The other case referred to is *Illinois Central Railway Co. v. Henderson Elevator Co.*, 226 U. S. 441. The action was by a shipper to recover damages caused by the erroneous quotation by the agent of a lower freight rate for an interstate

shipment than the rate fixed by the published tariff. The trial court instructed the jury that the plaintiff could recover if the loss was occasioned by the carrier's failure to have posted or filed at its stations, the freight rate in question and by reason of any erroneous quotation of defendant of its freight rate. The judgment on a verdict for plaintiff was reversed because "in conflicts with the rulings of the court, interpreting and applying the act to regulate Interstate Commerce."

The cases referred to where the rulings were made were *N. Y. C. & H. R. Co. v. United States*, 212 U. S. 504; *Texas, etc. R. Co. v. Mugg*, 202 U. S. 242, and *Gulf, etc. R. Co. v. Hefley*, 158 U. S. 98. In neither of these cases was the question involved whether filing the schedules at the various stations was essential to establish a tariff.

N. Y. C. & H. R. Co. v. United States, 212 U. S. 504, deals with rebating under the Elkins Act. It recognizes that there must be publication after filing with the Commission.

Gulf, etc. R. Co. v. Hefley, 158 U. S. 98, held that a state statute must yield to the Interstate Commerce Act which prescribed the published tariff rates as the rule of compensation. Attention is there called to the fact that by Sec. 6, of the Interstate Commerce Act, the carrier "for the inspection and information of the public (is) required to print and publicly post at each station upon its route the schedules of fares, etc." And that "such carriers are required to file with the Interstate Commerce Commissioin copies of their joint tariffs, which shall be made public by the

carriers when directed by the Commission, in so far as in the judgment of the Commission it is deemed practicable, the Commission being given power to prescribe the measure of publicity to be given, and the places in which the joint tariff shall be published."

The Commission in the exercise of their power prescribed the measure of publicity to be given and the places in which the tariffs shall be published when it adopted the rule promulgated on June 2, 1908 (Rec. 52).

Nothing is said in the opinion as to what shall constitute the publicity required, other than that it is to be determined by the Interstate Commerce Commission.

Texas, etc. R. Co. v. Mugg, 202, U. S. 242, was heard and determined on stipulated facts which recited that the schedule of rates had been duly published, printed and posted (which necessarily included filing with the agents) in its depots and stations as required by the terms of the act. The case followed the *Hefley case* and determined no more than that a common carrier may exact the rate shown by its printed and published schedules on file with the Interstate Commerce Commission, and posted in the stations of such carriers although a lower rate was quoted by the carrier to the shipper.

The court has made very clear the distinction between publication and posting, and the cases which hold that posting in the stations is not necessary to the validity of the tariff do not hold that the requirement that the schedules must be

placed in the hands of the station agents may be ignored. In all the cases which hold posting unnecessary, the schedules seem to have been in the hands of the station agents, and the tariffs thus published and established. Posting was regarded as something to be done thereafter.

In this case the carrier recognized the necessity of filing the schedules at stations when it filed them at certain stations. The rule of the Commision does not say that the distribution shall be on certain important stations several hundred miles apart. Such a construction would have to ignore the purpose of the requirement, which is to enable the shipper and agent to ascertain the rate.

The reasons for requiring publication by placing the schedules in the hands of the various station agents are compelling. Unless it is done, neither the shipper nor the agent can know the rates. It appears in the case at bar that the tariff schedules were filed in Minneapolis and St. Paul (practically one place) and nowhere else in the State of Minnesota. To say to a shipper at Moorhead, Minnesota, for illustration, that he may examine the tariff schedules at Minneapolis (231 miles away) or at Helena, Montana (880 miles away), or at Washington, D. C., verges on the ridiculous. If he relies on the statement of the station agent (who has no better means of information) and thereby suffers damages, he has no cause of action against the carrier. The tariff is the law, and he must know the law, as the subjects of the tyrant were re-

quired to know the laws which were posted high on the walls beyond the reach of sight.

The decision of the Supreme Court of Minnesota is in accord with the Interstate Commerce Law, the rules and decisions of the Interstate Commerce, and the decisions of this Court and should be affirmed.

Respectfully submitted,

CHARLES BURKE ELLIOTT,

for Defendant-in-error.

SCHAFF, AS RECEIVER OF THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, *v.* J. C. FAMECHON COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 91. Argued January 16, 1922.—Decided February 27, 1922.

A decision of a state court, denying a carrier's right to make a charge for refrigerator cars not provided for in tariffs filed at the stations where the shipments originated, and based wholly on an interpretation of the Interstate Commerce Act and the rules of the Interstate Commerce Commission, without questioning their validity, does not deny the validity of an authority exercised under the United States and is therefore not reviewable by writ of error under § 237, Jud. Code, as amended. P. 80.

Writ of error to review 145 Minn. 108, dismissed.

ERROR to review a judgment of the Supreme Court of Minnesota, which denied the right of a carrier to recover charges for refrigerator cars employed in interstate shipments.

76. Argument for Plaintiff in Error.

Mr. Charles W. Bunn for plaintiff in error.

The court below held Circular No. 12, Western Trunk Lines, which was on file at the originating stations, not applicable to shipments destined by Southwestern Lines to Oklahoma and Texas, unless made applicable by Southwestern Lines Tariff, and that this tariff, while adopting Circular No. 12 by reference, was not valid as to the shipments in question because not filed at stations where those shipments originated.

The judgment is reviewable by writ of error. Act of September 6, 1916, 39 Stat. 726; *Northern Pacific Ry. Co.* v. *North Dakota*, 250 U. S. 135; *Alabama & Vicksburg Ry. Co.* v. *Journey*, 257 U. S. 111; *Buck* v. *Colbath*, 3 Wall. 334. Distinguishing, *New York Central & Hudson River R. R. Co.* v. *York & Whitney Co.*, 256 U. S. 406; *Yazoo & Mississippi Valley R. R. Co.* v. *Nichols & Co.*, 256 U. S. 540; *Northern Pacific Ry. Co.* v. *Solum*, 247 U. S. 477, 481; *Ireland* v. *Woods*, 246 U. S. 323, 328; *Champion Lumber Co.* v. *Fisher*, 227 U. S. 445, 450. This case meets the requirement laid down in *United States* v. *Lynch*, 137 U. S. 280, 285, and *Baltimore & Potomac R. R. Co.* v. *Hopkins*, 130 U. S. 210.

In the *Journey Case, supra*, the court could not have intended, without discussion, to hold that there was no jurisdiction on writ of error, for, like the *North Dakota Case, supra*, it clearly involved the validity of an authority exercised under the United States. As pointed out in *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, some cases may be subject both to writ of error and certiorari, under Jud. Code, § 237. It is difficult to conceive a case where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, the decision being against their validity (in which case writ of error lies under the first clause of § 237), which does not also fall under the class of cases described in the last clause of that section (in which case certiorari is the proper writ). Such cases are subject to both writs.

Cases of writ of error or appeal from the District of Columbia and the Territories under the Act of March 3, 1885, and under § 250, Jud. Code, are in point as defining the cases where writ of error lies under the Act of 1916. *Steinmetz* v. *Allen*, 192 U. S. 543; *McLean* v. *Denver & Rio Grande R. R. Co.*, 203 U. S. 38, 47; *Smoot* v. *Heyl*, 227 U. S. 518, 522.

As to the merits: The court, construing the Interstate Commerce Act, held it required filing of every tariff at the shipping station and that a tariff was invalid for any purpose if not so filed, though otherwise duly filed and published as required by the act.

The contrary rule has been repeatedly decided by this court. *Berwind-White Coal Mining Co.* v. *Chicago & Erie R. R. Co.*, 235 U. S. 371; *American Express Co.* v. *U. S. Horse Shoe Co.*, 244 U. S. 58; *Illinois Central R. R. Co.* v. *Henderson Elevator Co.*, 226 U. S. 441; *Texas & Pacific Ry. Co.* v. *Cisco Oil Mill*, 204 U. S. 449.

How far one circular or tariff may be incorporated into another by reference is a question for the Interstate Commerce Commission, and its discretion is controlling. As to this particular tariff, the Commission, after full hearings, has held that the car rental charge is properly referred to and therefore a part of the Southwestern Lines Tariff. *Hale-Halsell Grocery Co.* v. *Missouri, Kansas & Texas Ry. Co.*, 42 I. C. C. 491; 45 I. C. C. 523.

Mr. Charles Burke Elliott, for defendant in error, submitted.

Mr. Justice Day delivered the opinion of the court.

Plaintiff in error, as receiver of the Missouri, Kansas & Texas Railway Company, brought suit against J. C. Famechon Company, in the Municipal Court of the City of Minneapolis, to recover for charges for rental of re-

frigerator cars used in shipping potatoes in 1914 and 1915 from various points in Minnesota over connecting lines to points in Oklahoma and Texas. The initial carriers were the Northern Pacific and Great Northern Railways, and the terminal carrier the Missouri, Kansas & Texas Railway Company, for which plaintiff in error was receiver. The terminal carrier received the potatoes, delivered them at their destinations, and collected from the shipper in excess of the regular line haul rate the sum of five dollars for the use of each refrigerator car in four shipments in 1915. Upon one refrigerator car, shipped in 1914, the excess was not collected. Famechon Company made claim against the railway company for an overcharge of five dollars on each of the four shipments so made in 1915. The railway company refunded twenty dollars to Famechon Company, for which sum the receiver brought suit, claiming the refund was made by mistake and through a misunderstanding of the tariff and schedules; he also brought suit to recover five dollars rental for the refrigerator car shipped in 1914.

Famechon Company, in its answer, put in issue the allegations of the complaint and pleaded a counterclaim for the rental paid on two cars shipped in 1916. In the Municipal Court of Minneapolis defendant in error had judgment for ten dollars with interest and costs, and the receiver for the railway company appealed to the Supreme Court of Minnesota, which affirmed the judgment. 145 Minn. 108. A writ of error was allowed bringing the case to this court.

From the facts found by the Supreme Court of Minnesota, and shown by evidence and stipulation, it appears that the established freight rate on potatoes in carloads from points of origin to points of destination, named in the pleadings, was contained in tariffs known as "Southwestern Lines' Tariffs". These tariffs were subject to the "Southwestern Lines' Classifications, Exceptions and

Rules Circulars." Neither such circular nor the Southwestern Lines' Tariffs was on file or published at any of the stations of origin of shipment, but they were on file in certain designated offices of the Northern Pacific and Great Northern Railways in Minneapolis and St. Paul, and at various points in other States. At the time the shipments were made, Western Trunk Line Circular No. 12, specifically referred to in Southwestern Lines' Classifications, Exceptions and Rules, was on file at the points of origin of shipment and destination; and it was the only tariff issued by any of the carriers participating in the transportation of the shipments in question which contained a five-dollar rental provision for refrigerator cars; that circular was printed and filed with the Interstate Commerce Commission, and contained a rule to the effect that, when the shipper ordered a refrigerator or other insulated car to be heated by him or to move without heat, a charge of five dollars per car per trip would be made for use of car which would accrue to the owner thereof.

The Supreme Court of Minnesota recited the provisions of § 6 of the Interstate Commerce Act, 34 Stat. 586, requiring the filing of rates and charges with the Interstate Commerce Commission and the posting thereof at stations, and the rule of the Interstate Commerce Commission, adopted June 2, 1908, requiring the filing of rates and schedules, and held that the additional charges could not be collected under that statute and rule because neither the Southwestern Lines' Tariffs, nor the Southwestern Lines' Classification, Exceptions and Rules circulars making reference to Circular No. 12 were on file at the point of origin of shipment, and that there were no tariffs on file at such points to which shippers could refer to ascertain the rates of transportation.

The case is brought here by writ of error. We are of opinion that we cannot acquire jurisdiction by that

method under § 237 of the Judicial Code as amended by the Act of September 6, 1916, c. 448, 39 Stat. 726. Counsel for plaintiff in error contends that a writ of error is the proper method of review because there was drawn in question the validity of an authority exercised under the United States, and that the effect of the State Supreme Court decision was to deny such validity. The argument is that the Interstate Commerce Act confers on carriers the right to receive the revenues defined in the tariffs, and is a command with penalties that carriers collect those revenues, and that, as the decision turns on the issue directly raised, and necessarily involved, whether the tariff was or was not valid, there was drawn in question the validity of an authority exercised under the United States; that the question really decided by the Supreme Court of Minnesota was not the interpretation of the tariff, nor the extent or nature of the rights claimed under it, but the validity of a tariff filed with the Interstate Commerce Commission. But we cannot accept this contention.

We have recently had occasion to consider the meaning of the phrase " validity of an authority " as used in § 237 of the Judicial Code as amended September 6, 1916. *Jett Brothers Distilling Co.* v. *Carrollton*, 252 U. S. 1, 6, and cases cited. We held that the validity of an authority was drawn in question when the power to create it is fairly open to denial, and is denied. In that case we cited with approval the same conclusion reached by this court in its opinion rendered by Mr. Chief Justice Fuller in *Baltimore & Potomac R. R. Co.* v. *Hopkins*, 130 U. S. 210. We see no occasion to depart from that definition of the phrase.

In the instant case the Supreme Court of Minnesota did not question the federal power to enact the statute as to rates with its requirements concerning the filing and posting thereof, nor the authority of the Interstate Commerce

Commission to make the rule quoted in its opinion. What the court did was to so interpret the statute and rule as to render essential the filing of the tariffs at stations at the points of origin of shipment. Such interpretation, whether right or wrong, did not involve the validity of an authority exercised under the United States, and the review in this court should have been sought by a petition for writ of certiorari.

The writ of error must be

Dismissed

JOHN SIMMONS COMPANY [illegible]